

86-989

No. 86-

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York, and the
NEW YORK CITY POLICE DEPARTMENT,
Petitioners,

-against-

MICHAEL J. OLIVIERI, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 566-4581 or 4338

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

* Counsel of Record

December 12, 1986

4012

QUESTION PRESENTED

1. Where petitioner police department determined that the danger to public safety arising from competing requests by respondents, a group of gay Catholics, and counter-demonstrators, for use of the sidewalk in front of St. Patrick's Cathedral during a "Gay Pride March" down New York City's Fifth Avenue required that such groups demonstrate from separate areas near but off the Cathedral sidewalk, with respondents allowed to conduct a short service in front of the Cathedral, and where the Court of Appeals agreed that the presence of both groups on the Cathedral sidewalk posed a threat to public safety, may the Court of Appeals hold that the de minimus restriction on respondents' speech violated the respondents' first amendment rights and substitute its judgment for that of petitioner police department by ordering

that members of the competing groups be allowed to remain on the Cathedral sidewalk, in a barricaded area, for limited and different periods of time during the March?



LIST OF PARTIES

The parties in the proceeding below
were:

Plaintiffs (Respondents here)

MICHAEL J. OLIVIERI
J. MATTHEW FORMAN
MICHAEL DILLINGER
TOM KOHLER
RICHARD FERRARA
EDMUND W. TRUST
HUGH R. BRUCE
JOHN D. EDWARDS
JOSEPH BROWN
JULIUS J. SPOHN
BERNARD L. TANSEY
CLINT WINANT
DAVID LAWLOR
JIM CANNON
JAMES DOYLE
NED LYNAM
EDWARD BYRNE
MICHAEL CONLEY
EDWARD HARBUR
ROBERT J. BUEL
CHRISTOPHER WESOLOWSKI
GARY M. SPOKES
DIGNITY - NEW YORK

Defendants (Petitioners here)

BENJAMIN WARD
EDWARD KOCH
NEW YORK CITY
POLICE DEPARTMENT



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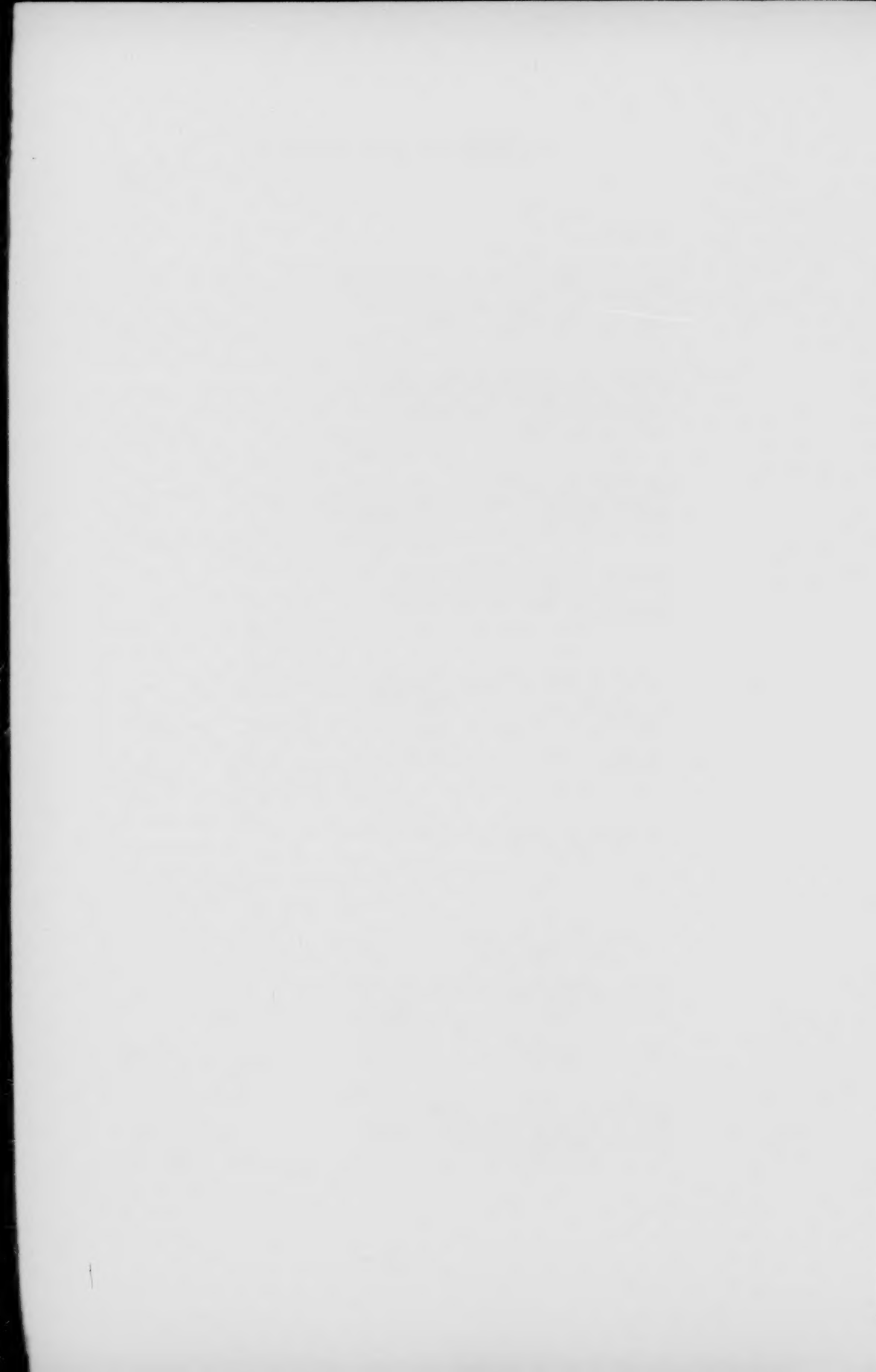


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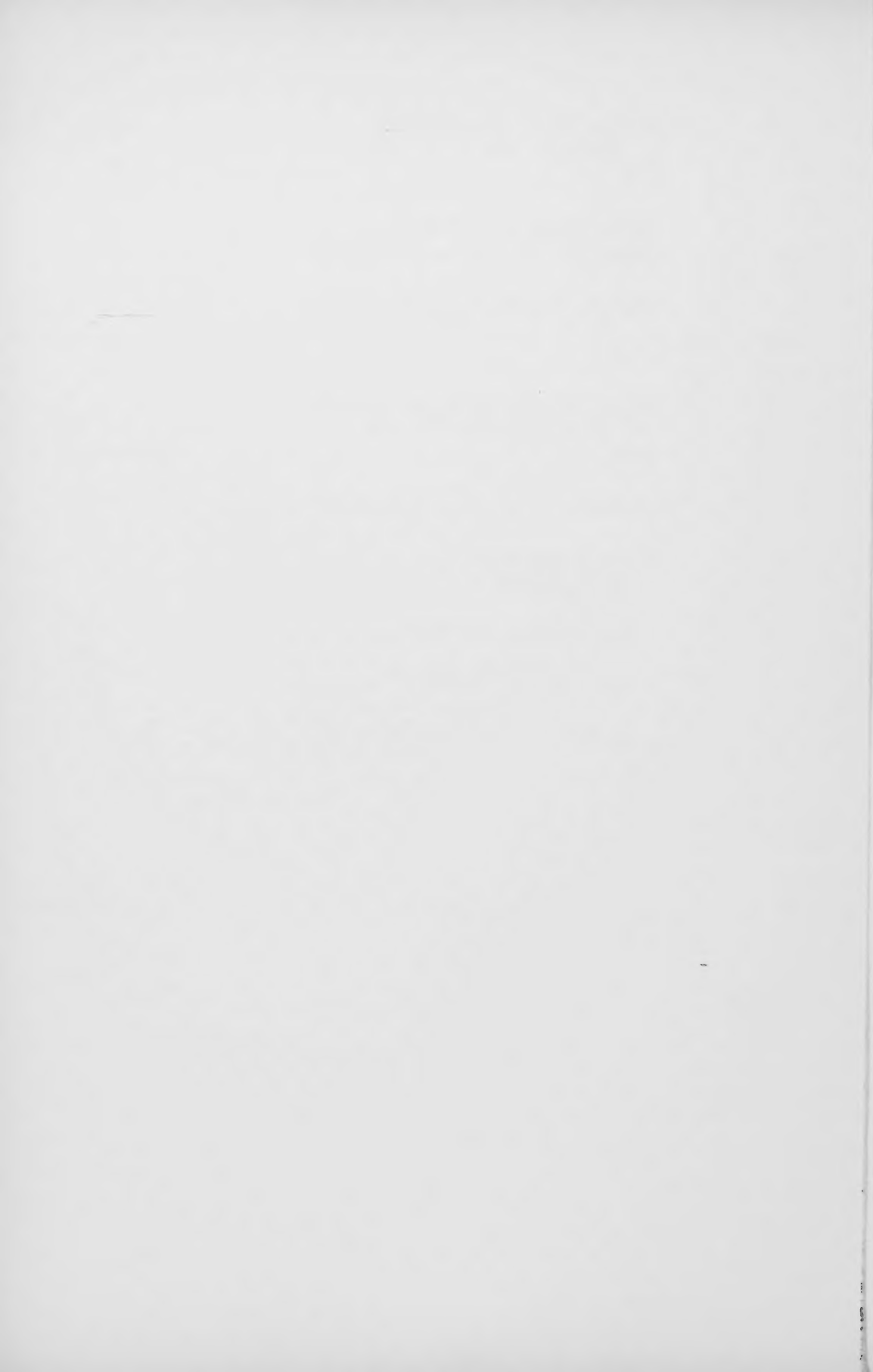
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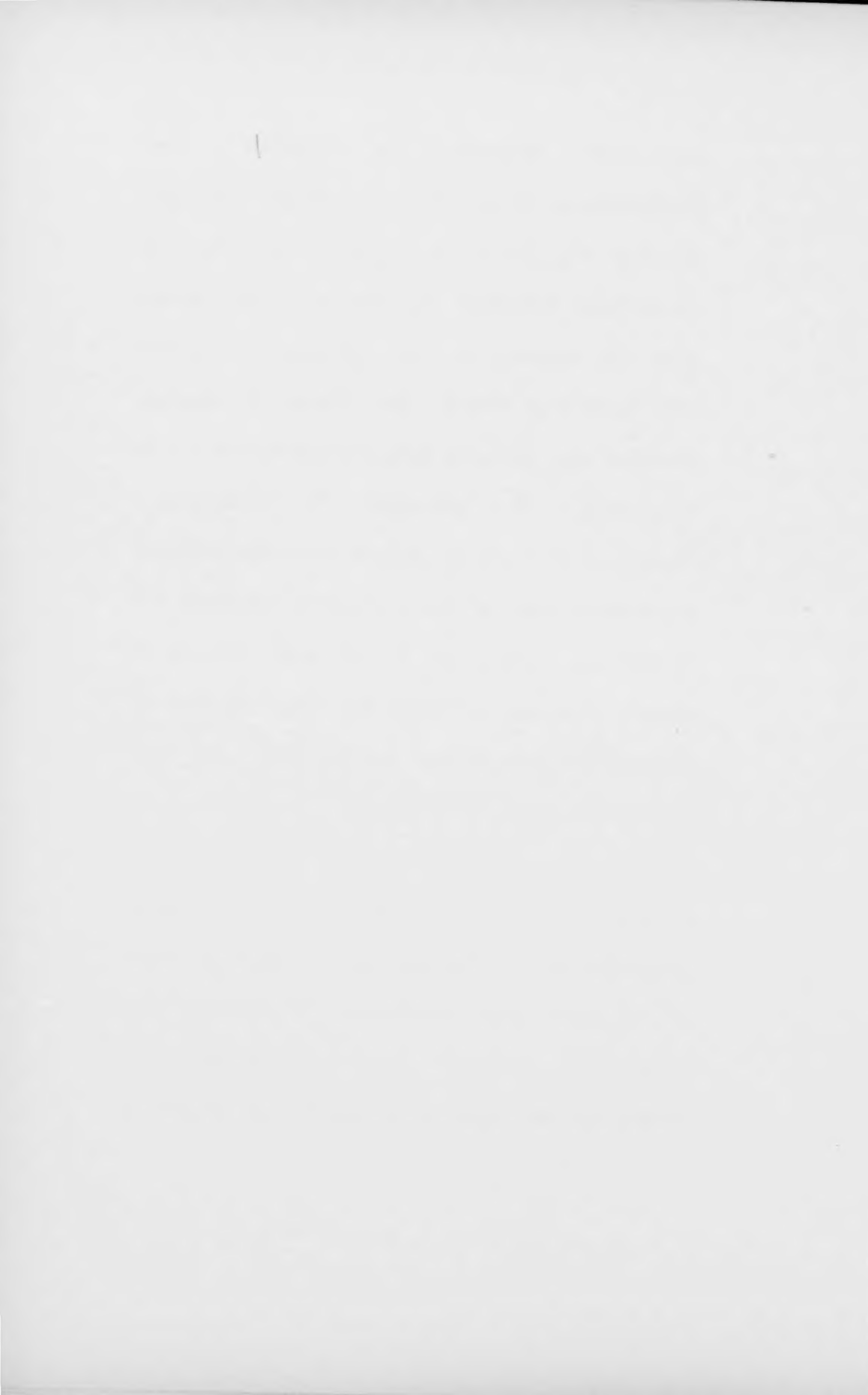
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners, Benjamin Ward, Police
Commissioner of the City of New York,
Edward I. Koch, Mayor of the City of New
York, and the New York City Police
Department, respectfully pray that a Writ of
Certiorari issue to review the judgment of

the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on September 16, 1986. The United States District Court for the Southern District of New York (Motley, C.J.), by judgment entered June 13, 1986, declared that the petitioners' determination that respondents, a group of gay Catholics, may not demonstrate on the public sidewalk directly in front of St. Patrick's Cathedral during the annual "Gay Pride March" in New York City was not a reasonable time, place and manner regulation, and enjoined petitioners from preventing up to 100 members of respondent Dignity-New York from demonstrating on the Cathedral sidewalk during the 1986 and subsequent Gay Pride Parades. The Court of Appeals held that the District Court erred in failing to consider the constitutional rights of counter-demonstrators to be present on the

Cathedral sidewalk to express their opposition to respondents' message. In light of what the Court of Appeals described as an obvious potential for confrontation arising from the sharing of the sidewalk by groups with opposing views, the Court of Appeals modified the District Court's injunction so as to allow 25 members of respondent Dignity-New York to remain within a limited, barricaded area of the Cathedral sidewalk for 30 minutes during the Parade and, after a 30 minute interval, to allow the same number of counter-demonstrators to appear on the sidewalk under the same circumstances. Although the District Court's declaration of unconstitutionality was substantially grounded in its finding that petitioners' fear of violence was irrational, a concern the Court of Appeals itself considered in modifying the injunctive relief, the Court of

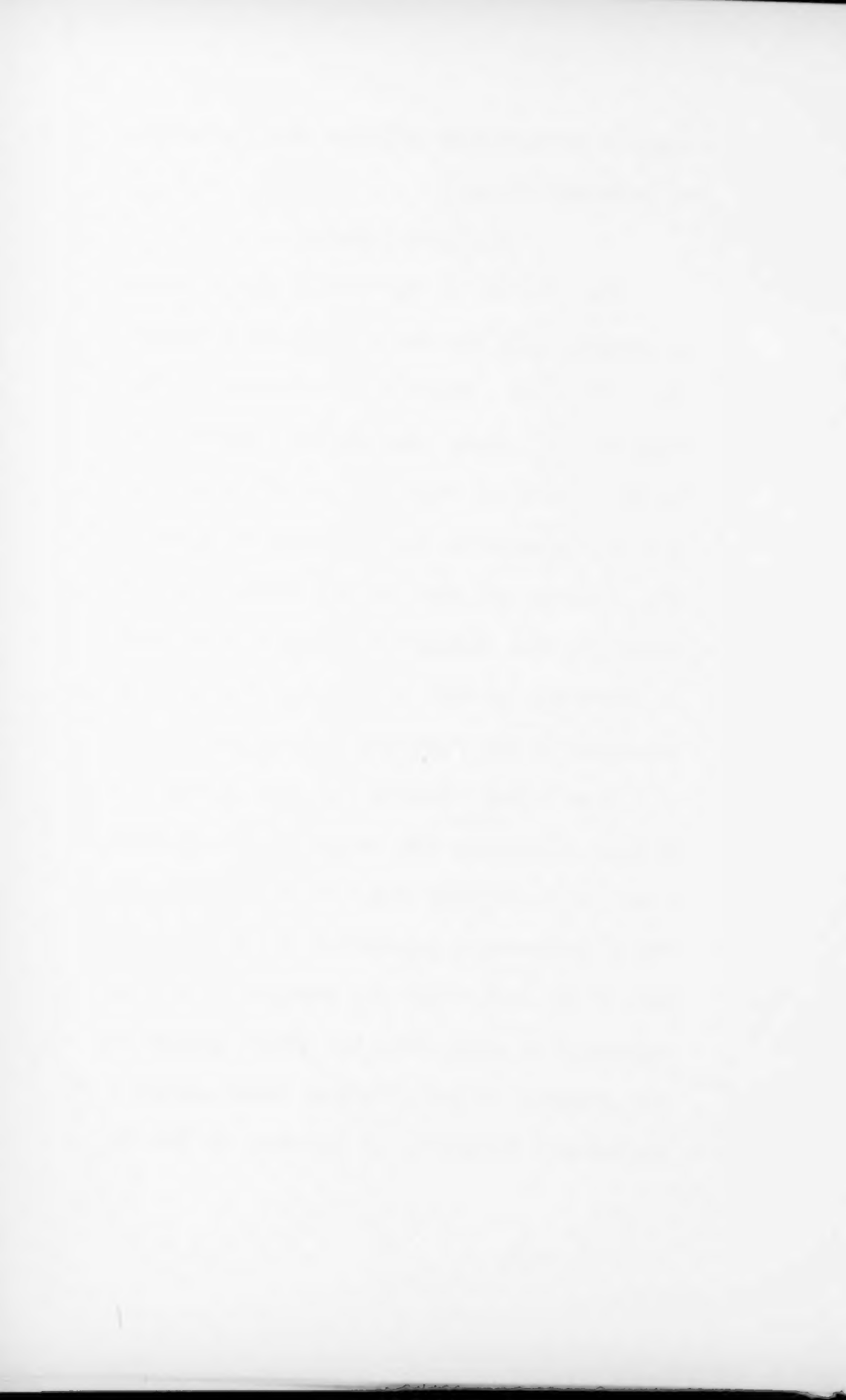


Appeals nevertheless affirmed the declaration of unconstitutionality.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the District Court's declaration that respondents' first amendment rights had been violated is reported at 801 F.2d 602 and is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York is reported at 637 F. Supp. 851 and is reprinted in the Appendix at page 35.

The prior opinion of the Court of Appeals reversing the order of the District Court and denying respondents' application for a preliminary injunction is reported at 766 F.2d 690 and is reprinted in the Appendix at page 163. The prior opinion of the District Court granting respondents a preliminary injunction is reported at 613 F.



Supp. 616 and is reprinted in the Appendix at page 202.

JURISDICTION

The judgment of the Court of Appeals was dated and entered September 16, 1986. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C. §1254(1). The petition has been filed within the time allowed by law.

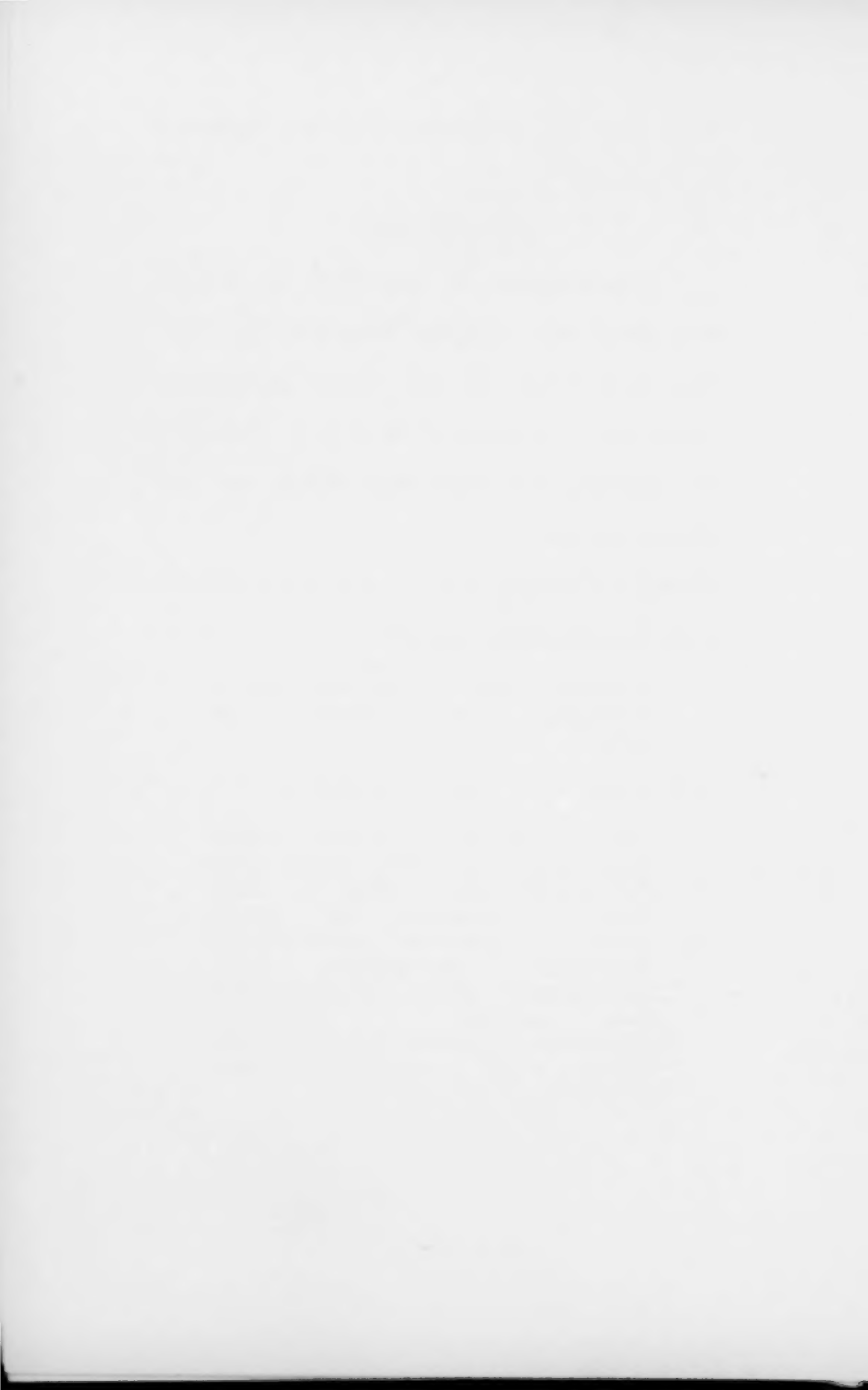
CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I:

Congress shall make no law...
abridging the freedom of
speech....

NEW YORK CITY CHARTER §435(a):

The [New York City] police department and force shall have the power and it shall be their duty to preserve the public peace,... disperse unlawful or dangerous assemblages and assemblages which obstruct the free passage of public... sidewalks... [and]... protect the rights of persons and property... .



STATEMENT OF THE CASE

(1)

Respondent Dignity-New York ("Dignity") is the local chapter for New York City of an international organization of gay and lesbian members of the Roman Catholic Church (CA5a).¹ Dignity and 22 of its members commenced this action pursuant to 42 U.S.C. §1983 for declaratory and injunctive relief on April 29, 1985. The dispute between the parties arose from the desire of respondents to demonstrate on the sidewalk in front of St. Patrick's Cathedral during the now annual "Gay Pride March". That parade is held each year in New York City on the last Sunday of June, and, since 1976, the marchers have proceeded down

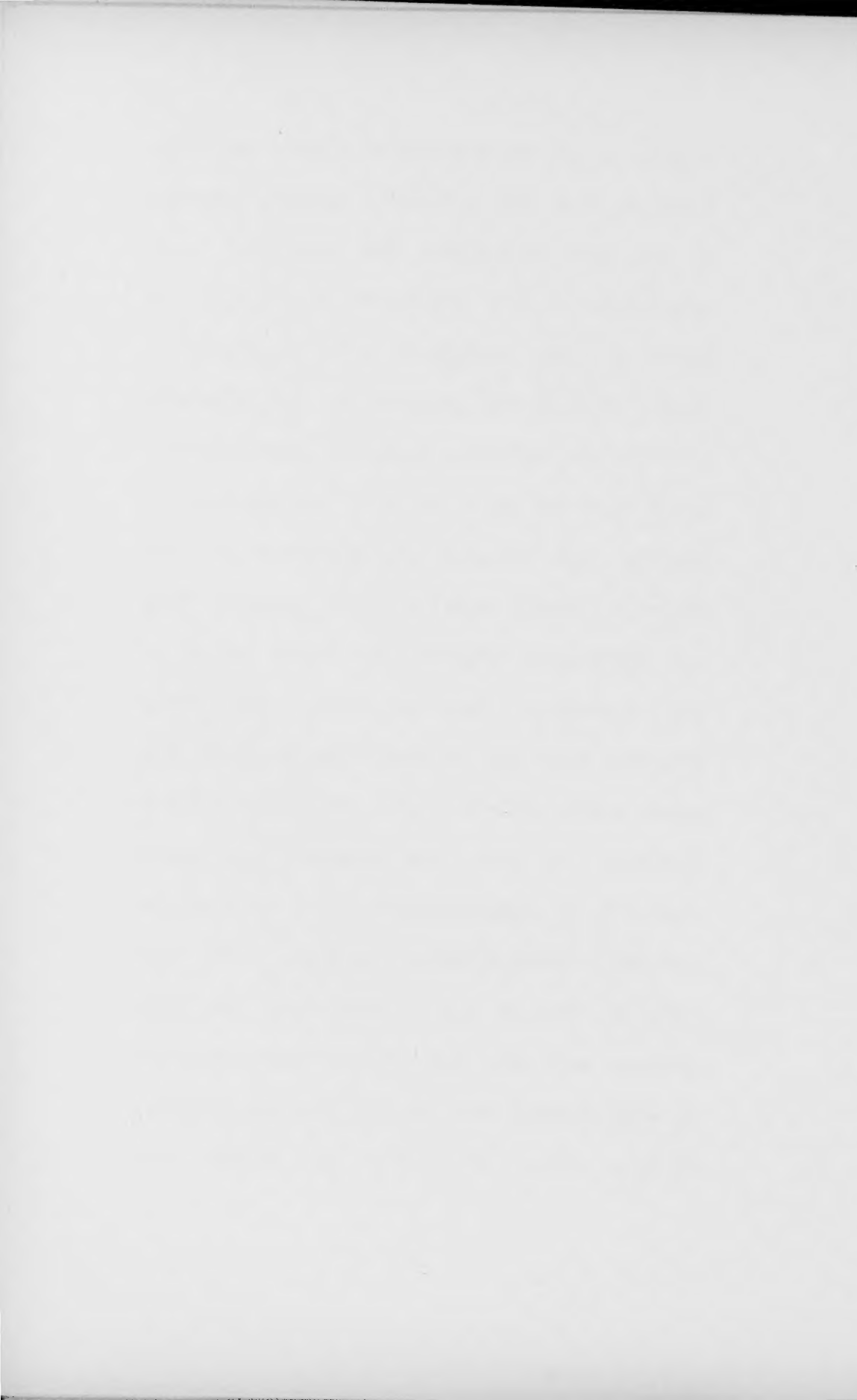
¹References preceded by "CA" are to the Joint Appendix in the Court of Appeals. References preceded by "A" are to the Appendix to this Petition.



Fifth Avenue (CA7a). St. Patrick's Cathedral, the seat of the Roman Catholic Archdiocese of New York, is located on the east side of Fifth Avenue between 50th and 51st Streets, along the parade route (CA7a-8a).

Prior to 1983, Dignity and the general public were given access to the sidewalk in front of the Cathedral during the Gay Pride March (CA10a-12a). In 1981, two self-appointed "protectors" of the Cathedral were arrested and charged with disorderly conduct after attempting to interfere with parade marchers' demonstrations on the Cathedral steps (CA11a-12a, A59-61). In 1982, the Cathedral sidewalk remained open but a greater number of police were assigned to patrol the Cathedral area (CA12a, CA349). In 1983, the Police Department's commanding officer for Manhattan Borough South determined that the sidewalk should be

closed to all demonstrators (A42, A51-52). Prior to that determination, groups opposed to the gay community had indicated their opposition to the presence of Dignity in front of the Cathedral and expressed a desire also to be present on the sidewalk (CA12a-16a; A53-54). Separate demonstration areas were set aside for both the members of Dignity and counter-demonstrators on the opposite (west) side of Fifth Avenue from the Cathedral; Dignity one block north of the Cathedral between 51st and 52nd Streets, with the counter-demonstrators one block south between 49th and 50th Streets (CA15a). In 1984, the sidewalk was again closed to all demonstrators, with an area for pro-gay demonstrators located near the building line on 51st Street west of Fifth Avenue and one for counter-demonstrators on 50th Street west of 5th Avenue (CA16a, CA152; A72). In 1984, the police also

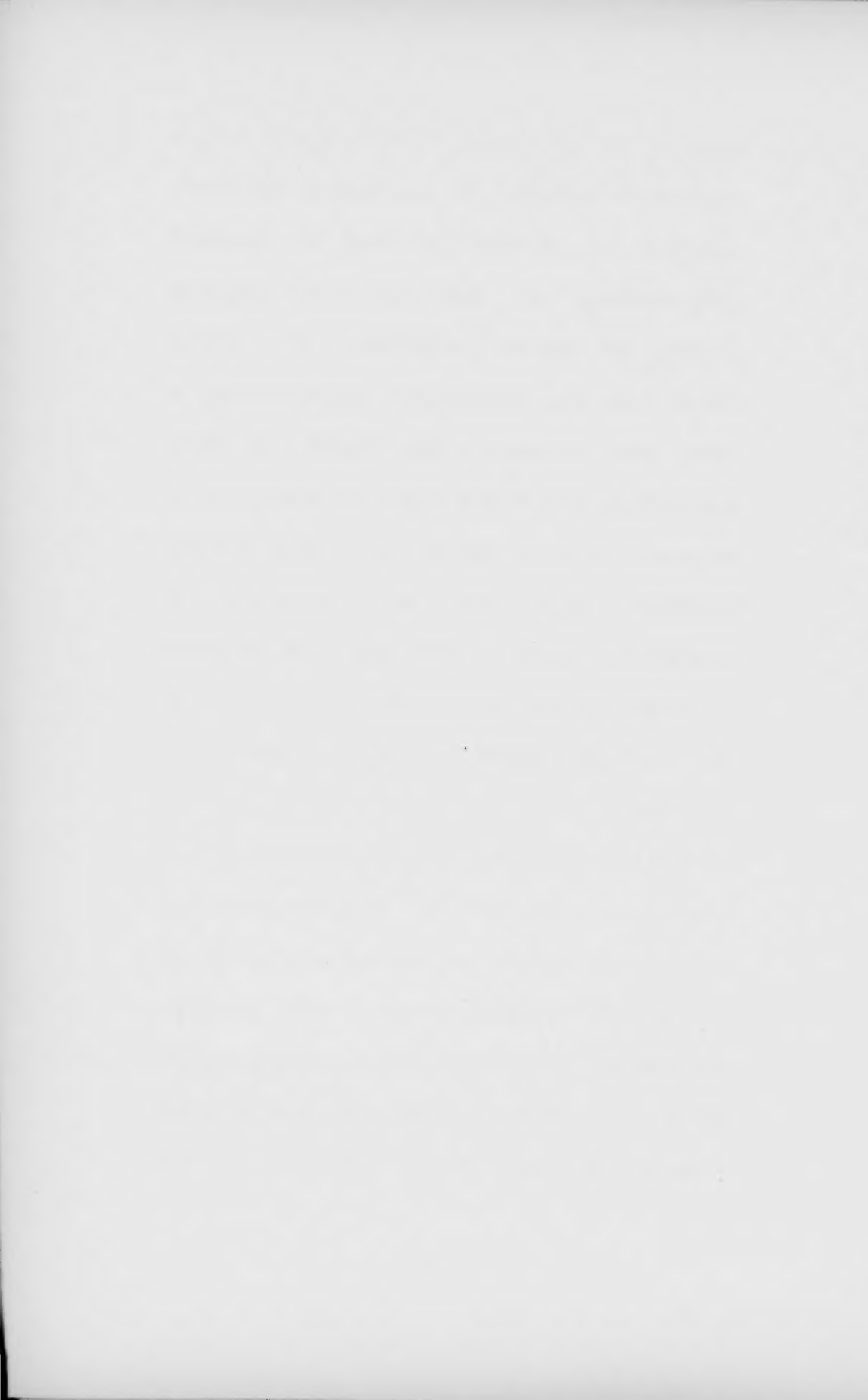


permitted Dignity to stop the line of march for ten to fifteen minutes for a service in front of the Cathedral; two members were allowed to enter the Cathedral sidewalk and place a wreath there (A74). In both 1983 and 1984, approximately 100 counter-demonstrators were present (A67, A72). In both years Dignity refused to take advantage of its assigned demonstration area, although in 1984 the wreath-laying service took place (CA15a-17a, A74). There were no reported incidents of violence at the 1983 or 1984 parades (CA15a, CA17a).

(2)

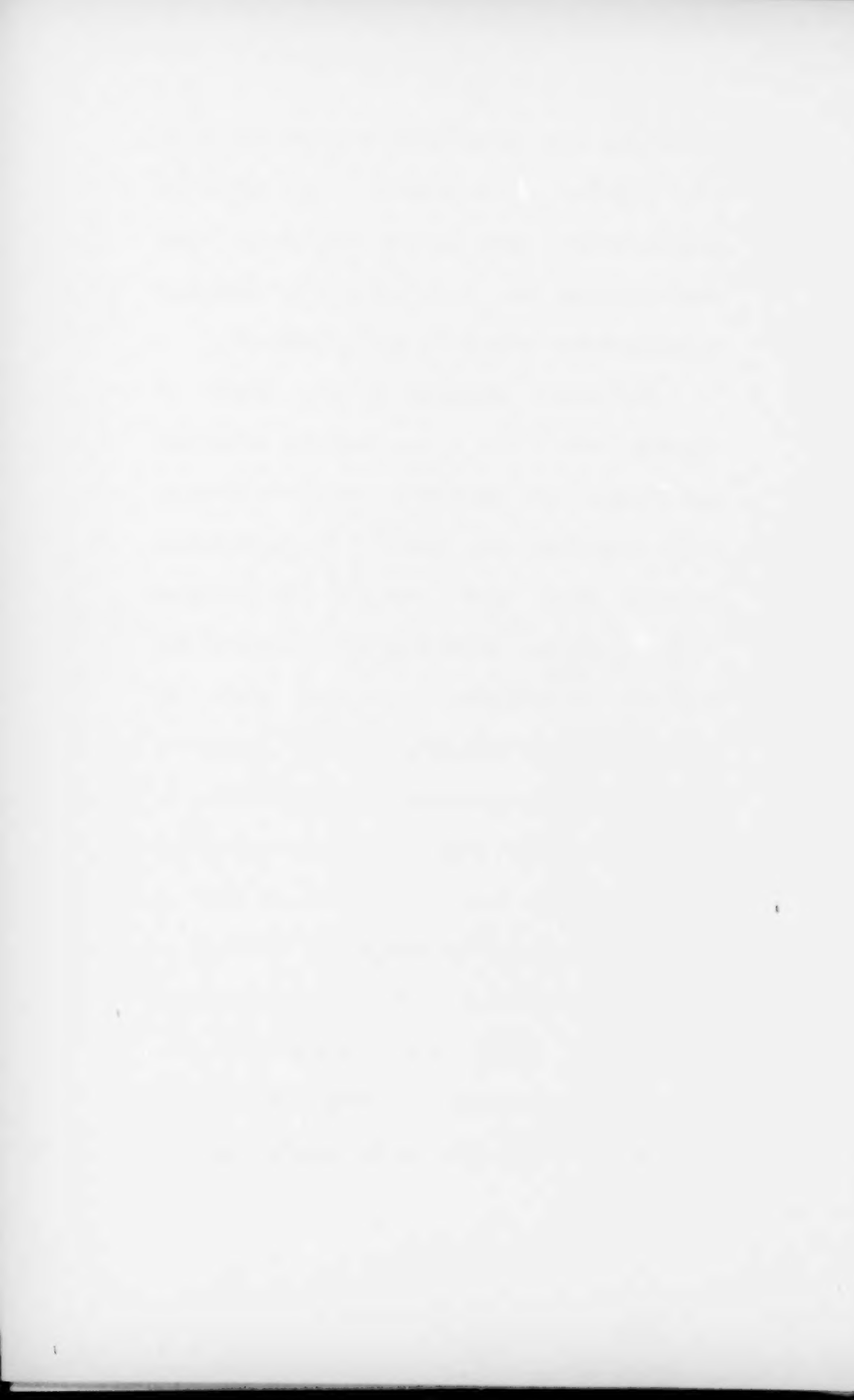
Respondents commenced this action a few months prior to the June 1985 parade, and applied for a preliminary injunction enjoining petitioners from prohibiting them from demonstrating on the Cathedral sidewalk during that year's parade (A203). After a hearing, the District Court (Motley, C. J.)

granted the injunction, and ordered that a reasonable number of respondent Dignity's members be allowed to hold a peaceful demonstration on the Cathedral sidewalk during the march (A199-201). The Court found that the petitioners' determination to close the sidewalk was based on mere speculation that there might be disruption if respondents were allowed to remain on the sidewalk, and that any objective of maintaining public order could be satisfied by removing the counter-demonstrators from the sidewalk (A219-20, A233). The Court also found that the wreath-laying service allowed respondents did not provide an alternative channel of communication as respondents sought to convey a message to the entire passing parade, and although defendants offered to allow demonstration areas to be placed on the east side of Fifth Avenue on the street adjacent to the



Cathedral, the Court held that placement of the Dignity demonstrators in such a demonstration area would interfere, with their message that they should be accepted as mainstream Catholics (A210, A239-40).

Petitioners appealed to the Court of Appeals, which by a 2-1 majority reversed and vacated the injunction (A163, A180-81). After reciting the history of antagonism between gays and members of various religious groups, including the refusal of the Catholic Archdiocese to hire gays in connection with its social service agencies, and provocative statements by both sides in connection with both past and upcoming parades, the Court found the District Court's finding of no danger of violence to be clearly erroneous (A169, A171-73, A178). The Court found the "freeze" of the sidewalk, applicable to respondents and counter-demonstrators, to be content-neutral



and reasonable, narrowly tailored so as to keep the demonstrators a reasonable distance from each other, and that the wreath-laying service and nearby demonstration area afforded ample alternative channels of communication (A177-80). The Court of Appeals noted that the determination that "freezing" the sidewalk was the best means of avoiding violence was one "uniquely within the Police Department's expertise", and that the respondents were being denied only "their preferred forum for demonstration" (A179-80).

(3)

In January 1986, respondents filed an amended complaint containing allegations relating to the 1986 march at which the petitioners intended again to "freeze" the Cathedral sidewalk (CA20a, CA1035-48). A trial on the merits was held by the District Court (Motley, C. J.). In its opinion, the



Court recognized that for the most part the objective facts were not in dispute, but that factual inferences to be drawn from the undisputed facts - such as motive and reasonableness - were in dispute (A38-39). The Court held that the petitioner's practice of keeping respondents off the Cathedral sidewalk was not adequately shown to be part of a "standard police practice" and that the trial record had now made clear that the petitioners' major rationale for keeping respondents off the sidewalk, that their presence there would increase the risk of violence during the Parade, was not credible or reasonable (A85-100; A135-36). Rather, the Court held that "a more convincing explanation for the police decision... is discomfort with the content of Dignity's message." (A136). In its conclusions of law, the Court held that the petitioners' plan was not content-neutral but rather a "heckler's



veto", that the assertion by petitioners of a danger of potential violence was pretextual, and that the police had shown an "excessive sensitivity to the Catholic Church." (A143-44, A150-51). As there was no credible danger of violence, the petitioners' plan was not narrowly tailored to promote a substantial public interest (A152-59). The District Court thus entered a declaration that the plan to keep respondents off the Cathedral sidewalk during the 1986 parade violated the respondents' rights of free speech, and enjoined petitioners from preventing up to one hundred of Dignity's members from holding a peaceful demonstration on the Cathedral sidewalk during the 1986 or any subsequent Gay Pride Parade (A32-34).

Petitioners again appealed to the Court of Appeals. On the day after argument, that Court issued an order on its own motion



staying the injunction of the District Court so as to allow 25 members of respondent Dignity to remain in a limited area of the Cathedral sidewalk, within police barricades, for a thirty minute period; after an interval of no less than 30 minutes, up to 25 counter-demonstrators would be allowed to remain within the same area for an equal period of time (A27-31). At the time of the order, only two days remained to the date of the Parade, and the Court did not believe it could "adequately resolve the significant issues raised by the appeal" in time to issue an opinion prior to the parade (A28). A joint stipulation of facts was thereafter filed with the Court of Appeals, showing that a peak of 150 counter-demonstrators appeared at the Cathedral, and that while Parade participants directed derogatory obscenities at Catholic nuns, priests and Cardinal O'Connor, there

were no reported incidents of violence (A11-12, n.1).

On September 16, 1986, the Court of Appeals issued its opinion (A1). The Court held that Dignity's presence on the Cathedral sidewalk is assured as an exercise of its members' constitutional rights (A17-19). It disagreed with the petitioners' argument that the District Court's findings on the potential for violence are beyond judicial competence, and agreed with the District Court that the restrictions imposed were not "drawn solely to further the government's conceded interest in public safety" (A14-17). However, the Court held that the District Court's opinion and order did not protect the constitutional rights of the counter-demonstrators to convey their opposition to the views of Dignity (A17-19). The Court attempted to accommodate the free speech rights of the two groups of



demonstrators and the legitimate public safety concerns over the potential for confrontation and violence which the Court of Appeals held to be "obviously present when the opposing groups share the same public forum at the same time." (A18). The Court concluded that its own stay order provided a proper, content-neutral accommodation of such concerns (A22-25). The Court affirmed the declaration of unconstitutionality, but replaced the District Court's injunction with the provisions of its stay order, to be subsequently modified by the District Court on a showing of significantly changed circumstances or by agreement (A25-26).

REASONS FOR GRANTING THE WRIT

The judgment of the District Court, as modified by the order of the Court of Appeals, constitutes an impermissible second guessing of the judgment of those charged

by state law with assuring public safety which is not only unsupported by precedent but is inconsistent with the holding of this Court in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and that of the Court of Appeals for the District of Columbia Circuit in White House Vigil v. Clock, 746 F.2d 1518 (D.C. Cir. 1984). The police judgment that the competing desires of respondents and counter-demonstrators for use of the Cathedral sidewalk required that the sidewalk be "frozen" to all demonstrations other than the wreath-laying service by respondents was a proper and rational exercise of their statutory duties. In addition to the wreath-laying service, petitioners have always made nearby demonstration areas available to respondents; this case concerns only the side of Fifth Avenue on which respondents' demonstration should take place. Although petitioners



have always attempted to cooperate with respondents and the organizers of the Parade, respondents have continued to press for the optimal setting for their demonstration. The limitations on respondents' speech is de minimus, and we are aware of no case law to support the District Court's finding that it is a "heckler's veto." The order of the Court of Appeals, premised on a recognition that the presence of respondents and counter-demonstrators on the Cathedral sidewalk poses an obvious potential for confrontation and violence, but which requires that a limited number of respondents and counter-demonstrators be allowed to demonstrate on the sidewalk under specific controlled conditions, constitutes a matter of disagreement with petitioners' judgment as to the best means of dealing with a problem of public safety, and is

therefore the kind of fine-tuning forbidden by this Court in Clark. The federal judiciary should not interfere with reasonable time, place and manner restrictions grounded in good-faith police judgments, especially those judgments made by the police of our large municipalities whose streets provide a forum for groups with diverse and often hostile philosophies.

(1)

This Court has recently cautioned that courts must be careful not to substitute their judgment for that of the responsible governmental entity when reviewing time, place and manner restrictions:

The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much



protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either United States v. O'Brien or the time, place and manner decisions assign to the judiciary an authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level or conservation is to be attained. (emphasis added.)

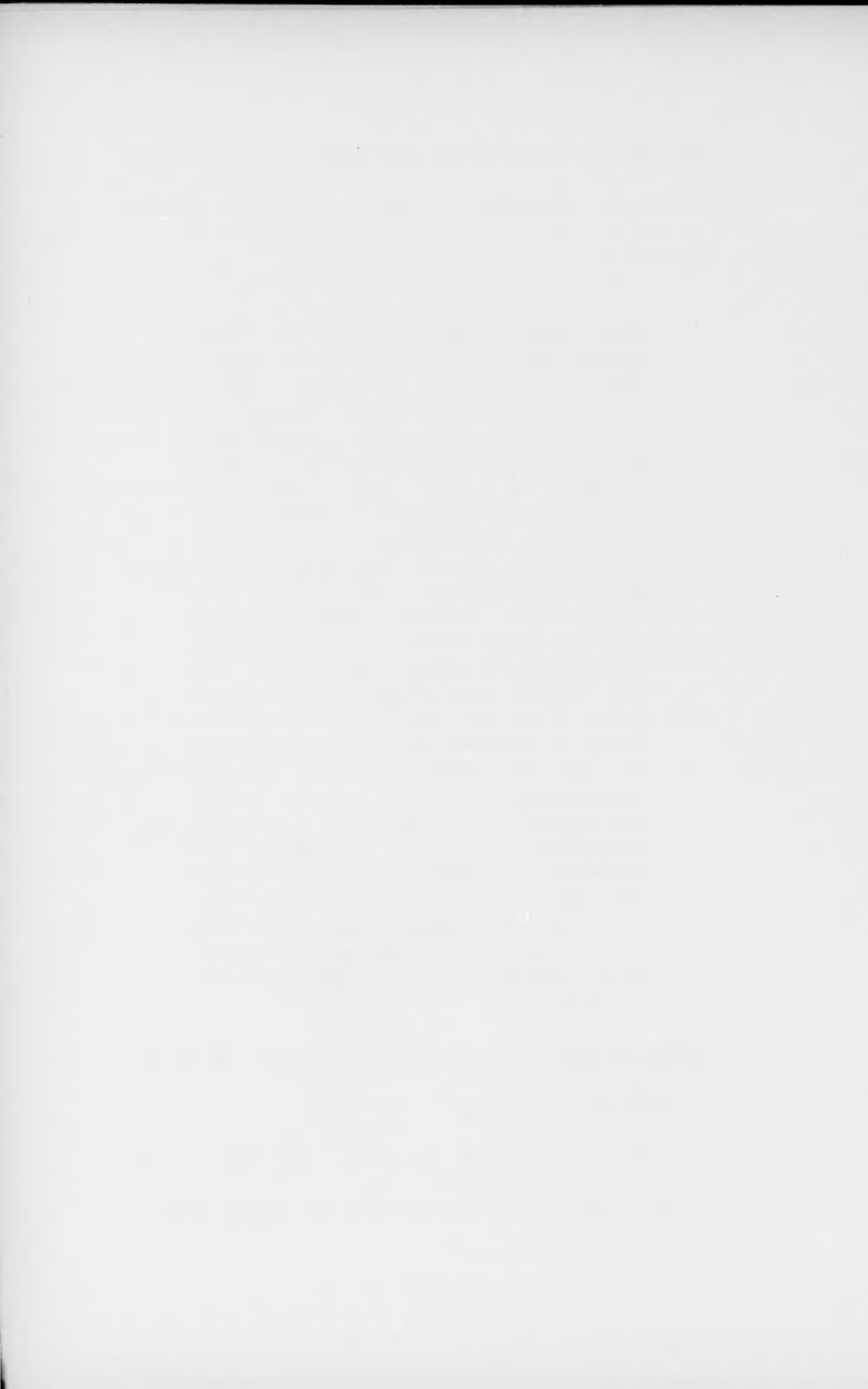
Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299; see also, United States v. Albertini, ___ U.S. ___, 105 S. Ct. 2897, 2907 (1985) ("The validity of such regulations does not turn on the judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests."). Likewise the Court of Appeals for the District of Columbia Circuit, in a decision which, it is submitted, is consistent with the dictates of Clark, held that in reviewing a National Park Service

regulation restricting demonstrations on the sidewalk directly in front of the White House:

The issue for decision on this appeal is not factual, it is legal; did the Park Service draft regulations that were "narrowly tailored to serve a significant governmental interest"? The agency in this case was the institution charged with the principal resolution of factual issues; the court's role was limited to determining whether the regulations which the agency adopted were within the boundaries of constitutionality prescribed by the first amendment. If they were, it is not the province of the court to "finetune" the regulations so as to institute the single regulatory option the court personally considers most desirable. Courts possess no particular expertise in the drafting of regulatory measures; their role is to uphold regulations which are constitutional and to strike down those which are not. (Emphasis in original.)

White House Vigil v. Clark, supra, 746 F.2d at 1528-29.

The Court of Appeals in this case refused to follow the holding in White House



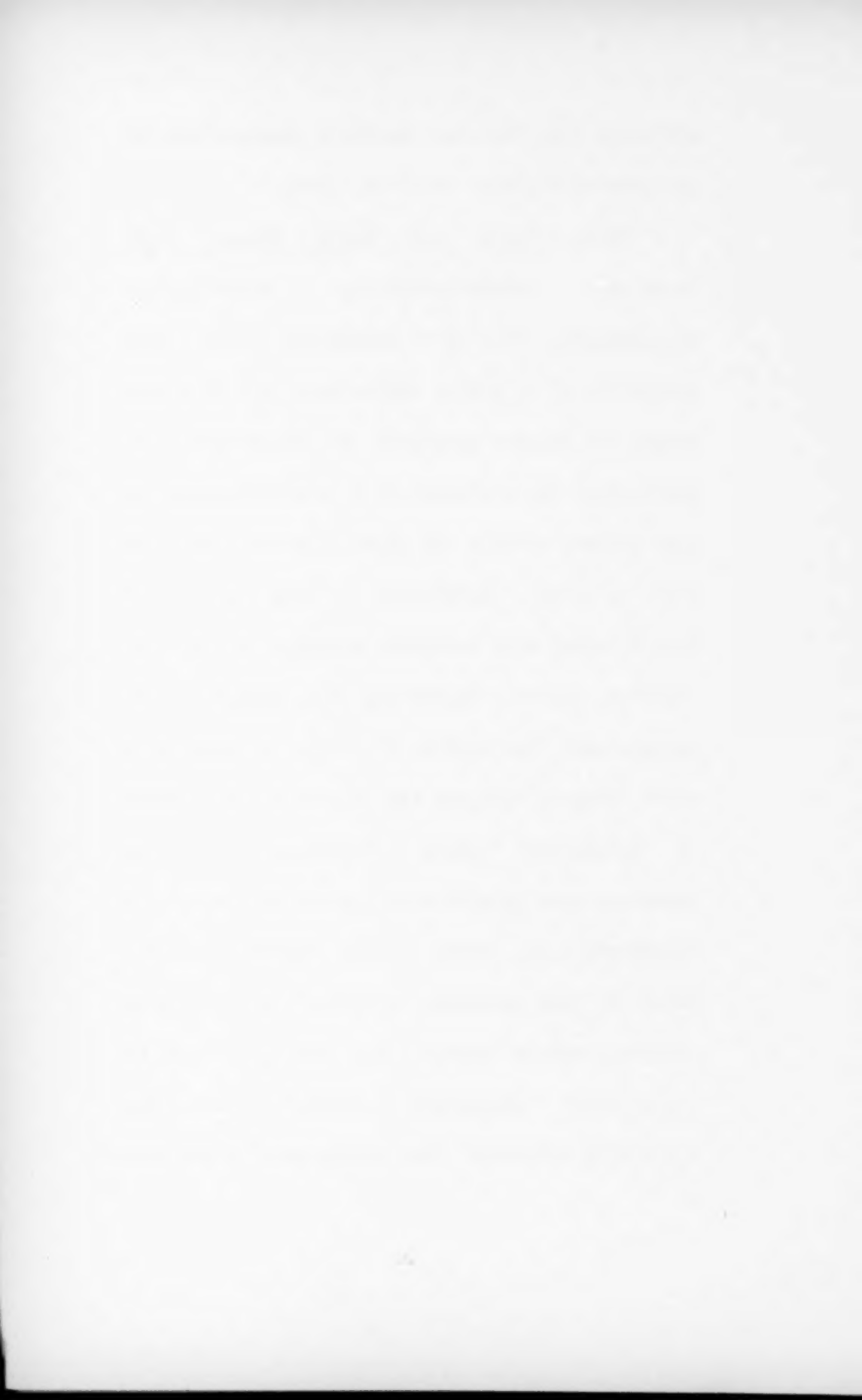
Vigil (A15). A consideration of the opinion of the District Court, whose declaration of unconstitutionality was affirmed by the Court of Appeals, reveals the extent to which those courts have second guessed the judgment of the petitioner police department in whom state law has reserved the responsibility for assuring the public safety. New York City Charter, §435(a). In finding the petitioner's concern for violence to be speculative and irrational, the District Court pointed to, inter alia: 1) the failure of prior fears concerning violence and size of crowds to come to fruition (A96-97, A105-07); (2) the religious conviction of some anti-gay counter-demonstrators (e.g., Protestant or Jewish), whom the Court believed would have little interest in the presence of Dignity on the Cathedral sidewalk (A103-104, A112-13); and (3) the Court's belief that anti-gay hostility arising

from controversies concerning gay rights would be directed at the parade itself rather than the presence of respondents on the sidewalk (A114-16). The Court found that acts which inflamed anti-gay feeling during parades in the past, including the placing of a crucifix in a trash can and the dressing of a marcher as a nun with a pig's face, were not related to respondents (A116-17). The Court also analyzed other recent demonstrations involving religious or gay issues, and found they were not logically connected to any potential for violence on the Cathedral sidewalk (A117-25). The District Court held that even if there were a large turnout by counter-demonstrators, "it is extremely unlikely that the police will be unable to maintain order" (A125). Although the Court of Appeals, like petitioners, recognized the danger of violence and modified the injunction, it nevertheless



affirmed the District Court's declaration of unconstitutionality (A18-19, A26).

While Clark and White House Vigil involved administratively promulgated regulations, it is submitted that the judgment of a police department as to those steps it deems prudent or necessary for prevention of violence at a demonstration on the public streets is deserving of equal if not greater deference. The kind of fact-finding and analysis engaged in by the District Court, involving the weighing of danger and the ability of police to deal with such danger, placed the Court in the shoes of petitioner police department, whose members are specifically entrusted with and competent to make such determinations. Even in the absence of proof that serious violence would result from the presence of respondent Dignity's members on the Cathedral sidewalk, the petitioners' expertise



in determining the method of most safely dealing with a parade or demonstration marked by antagonistic forces should not be second guessed by either the District Court or the Court of Appeals. Here the petitioners' plan to allow the wreath laying service and nearby demonstration areas results in only a de minimus limitation on respondents' speech, one, it is submitted, which is no less intrusive than the Court of Appeals' order. Just as this Court may not replace the Park Service as manager of the nation's parks, the Courts below should not be allowed to replace their judgment for that of petitioners. Clark, supra, 468 U.S. at 299.

(2)

Applying the dictates of this Court in Clark, it becomes apparent that the decision of the petitioners is a reasonable time, place and manner restriction. It is content-



neutral; there has been no attempt to silence respondents' message, and the "freeze" applies equally to both respondents and counter-demonstrators. The case law relied upon by the District Court for its holding that the restriction was not content-neutral but rather was a "heckler's veto" simply does not support such holding. See, Coates v. City of Cincinnati, 402 U.S. 611 (1979); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Collin v. Chicago Park District, 460 F.2d 746 (7th Cir., 1972). In contrast to those cases, the respondents have not been threatened with criminal prosecution for assembling or speaking, nor have they been barred from delivering their message to their intended audiences. There has been no attempt to "grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more contraversial views." See

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972), the sole case cited by the Court of Appeals in finding that respondents and counter-demonstrators must be allowed access to the Cathedral sidewalk (A19). This case concerns only the side of the street on which the respondents' demonstration should take place, and the law is clear that the First Amendment does not guarantee an optimal setting for speech as demanded by respondents; there is simply "no right to the backdrop most interesting to press photographers or television cameramen". Finzer v. Barry, 798 F.2d 1450, 1462-63 (D.C. Cir., 1986), citing Heffron v. Int'l. Soc. for Krishna Consc., 452 U.S. 640, 647 (1981). Furthermore, while the content of respondents' and the counter-demonstrators' speech is not unrelated to the need to keep the Cathedral sidewalk closed, it is the "secondary effect"



of their presence on the sidewalk, i.e, the threat of violence, not the content of such speech, which petitioners seek to prevent.

City of Renton v. Playtime Theatres, Inc.,

___U.S.___, 106 S. Ct. 925, 929 (1986).

The vague finding by the District Court to the effect that the petitioners were motivated by "sensitivity to the discomfort of counter-demonstrators and the Catholic Church ... with Dignity's message...", a finding grounded in the District Court's improper disagreement with petitioners' judgment that the Cathedral sidewalk should be closed to all demonstrators during the March (A136), is, in any event, insufficient to constitute a finding that the substantial motivating factor in the decision by petitioners' responsible officials to close the sidewalk was the content of respondents'



speech, not prevention of possible violence.²
City of Renton v. Playtime Theatres, Inc.,
supra, 106 U.S. at 929; In re G & A Books,
Inc. v. Stern, 770 F.2d 288, 297 (2d Cir.,
1985), cert. den. sub. nom. M.J.M.
Exhibition Inc. v. Stern, ___ U.S. ___, 106 S.
Ct. 1195 (1986).

The issue of whether the restriction is narrowly tailored provides what is perhaps the most stark example of "fine-tuning" in this case. The Court of Appeals' determination that, rather than having all demonstrators kept off the sidewalk and placed in areas nearby, there should be limited numbers of each group of demonstrators allowed on the sidewalk within

²The Court of Appeals similarly opined that "[w]e agree with the district court that the restrictions imposed were not shown solely to further the government's conceded interest in public safety" (A17).



limited, protected areas, is the kind of judicial disagreement with responsible officials which is simply outside the authority of the judiciary. Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299. The Court's belief that there may be a less restrictive way to further the significant government interest is not a basis for invalidating the restriction. United States v. Albertini, supra, 105 S. Ct. at 2907.

Finally, while the District Court did not reach the issue of whether there remained ample alternative channels for communication of respondents' message, the Court of Appeals, on appeal from the preliminary injunction, explicitly held that the wreath-laying service, together with nearby available demonstration areas, provided ample alternative channels for respondents' message (A179). This is consistent with the law in the Second Circuit (see, Concerned Jewish



Youth v. McGuire, 621 F2d 471, 475-76 (2nd Cir. 1980), cert. den. 450 U.S. 913 (1981), and, it is submitted, the decisional law of this Court. See Heffron v. Int'l Soc. for Krishna Consc., supra, 452 U.S. at 654-5.

In conclusion, we recognize that the decision of petitioners' responsible officials to close the Cathedral sidewalk was a result of caution, perhaps an excess of caution. However, such caution, not always shared by the judiciary, reflects a proper concern for their responsibility to preserve the public order. The decision of the Court of Appeals, if allowed to stand, will serve a mischief by allowing courts to interfere with and second guess the decisions of those charged by law with the responsibility of assuring the public safety of all, including demonstrators like respondents. Accordingly, this petition should be granted.



CONCLUSION

THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE
GRANTED.

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel
for the City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

*Counsel of Record

December 12, 1986

86-989 (2)
No. 86-

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOSEPH F. SPANIOLO, JR.
CLERK

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

- v. -

MICHAEL J. OLIVIERI, et al.,

Respondents.

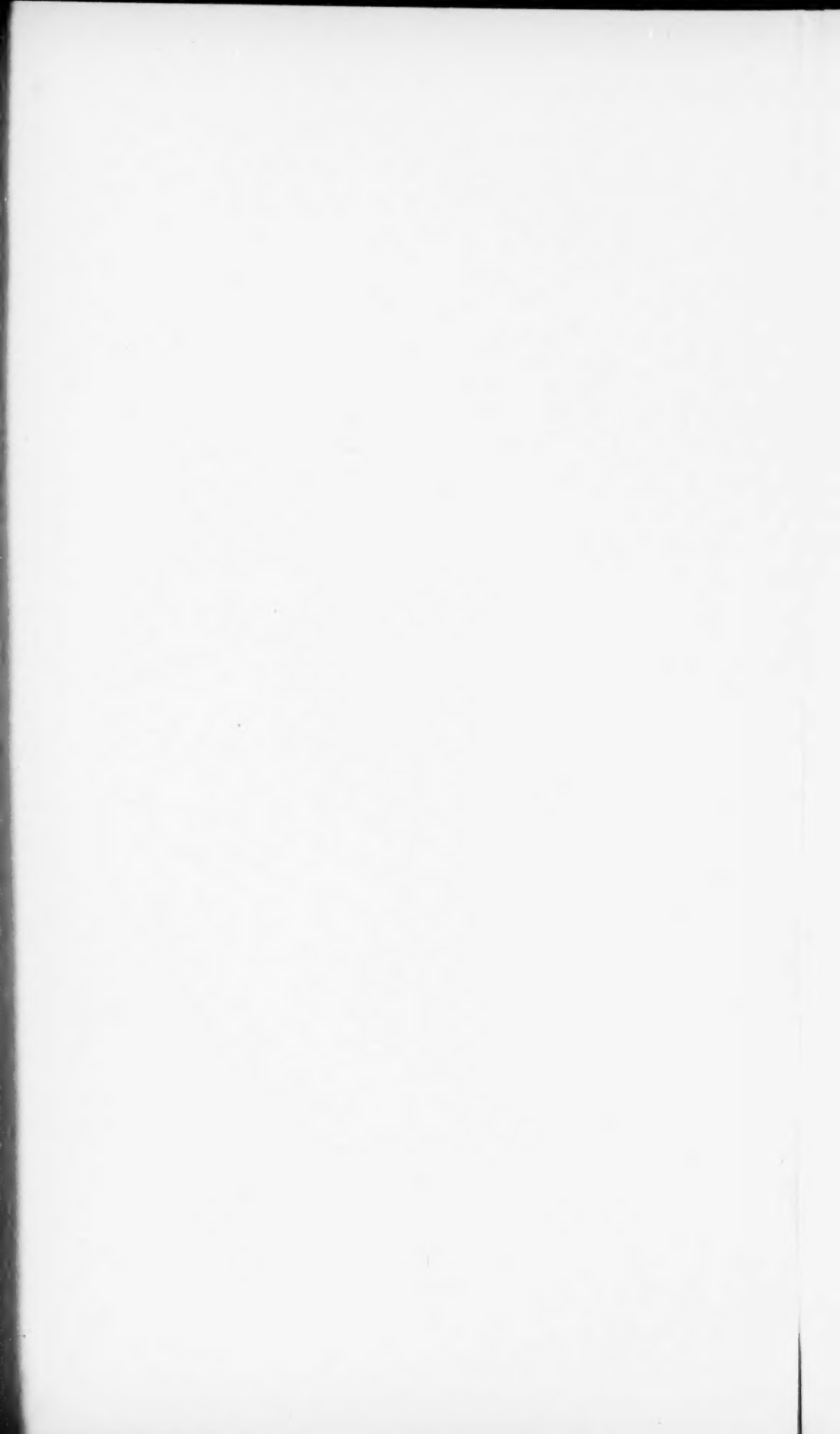
APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
TWO VOLUMES
VOL. I, PP. 1-162

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4581 or 4338

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

*Counsel of Record

December 12, 1986



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DECISION OF THE UNITED STATES COURT
OF THE APPEALS FOR THE SECOND
CIRCUIT

No. 1573--August Term 1985
(Argued June 26, 1986 Decided
September 16, 1986)
Docket No. 86-7479

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLE, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN D.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, JAMES DOYLE, DAVID LAWLOR,
JIM CANNON, NED LYNAM, EDWARD
BYRNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES,
DIGNITY-NEW YORK,

Plaintiffs-Appellees,

- v. -

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

Defendants-Appellants.

B e f o r e :

NEWMAN, CARDAMONE, and PIERCE,
Circuit Judges.

Expedited appeal by defendants Benjamin Ward, Police Commissioner of the City of New York, et al., from an order entered in the United States District Court for the Southern District of New York (Motley, C.J.) on June 13, 1986 that granted plaintiffs, Dignity-New York, Michael Olivieri, its president, et al. a judgment declaring that their civil rights protected by 42 U.S.C. § 1983 had been infringed and granted plaintiffs an injunction permanently enjoining defendants.

Affirmed, as modified, in part,
reversed in part.

STEPHEN J. McGRATH, New York, New York (Frederick A. O. Schwarz, Jr., Leonard Koerner, David Drueding, Jonathan L. Pines, Corporation Counsel, New York, New York, of counsel), for Defendants-Appellants.

RONALD K. CHEN, New York, New York (Stuart W. Gold, J. Pope Langstaff, Jennifer J. Raab, New York, New York, of counsel), for Plaintiffs-Appellees.

ABBY R. RUBENFELD, New York, New York (Paula L. Ettelbrick, Andrew Dillman, New York, New York, of counsel), for Amicus Curiae LAMBDA Legal Defense and Education Fund Inc.

CARDAMONE, Circuit Judge:

This expedited appeal arises from one aspect of the "Gay Pride Parade" held in Manhattan on Sunday, June 29, 1986. Plaintiffs are Dignity-New York, a not-for-profit New York Corporation (Dignity), Michael Olivieri, its president, and 21 other gay Catholic members of Dignity-New York.

number of persons who opposed the Parade and who have at times conducted counter-demonstrations, have been present in the vicinity of St. Patrick's Cathedral. (Undisputed Facts # 30.) Recognizable counterdemonstrators have, however, never numbered many more than a hundred or so. (See Infra.) Counterdemonstration organizers contend that individual members of the following groups, among others, have appeared at various Gay Pride Parades in the past: the Knights of Columbus, the Ancient Order of Hibernians, the Holy Name Society, the Catholic War Veterans, a group of Orthodox Jews, and a group known as the "Baysiders," famous for their devotion to the Rosary. (Undisputed Facts # 32; Tr. 525, 547-48.) These organizations are established groups in the community and have no history or agenda of violence (Tr. 181, 199.) Many of the Catholic counterdemonstrators

treasure the Cathedral as a symbol of their Catholic faith and view the presence of self-acknowledged gays on its steps and sidewalk to be a "desecration." Accordingly, they oppose Dignity's, as well as other gay groups', presence in the area immediately fronting the church during the Parade. (Undisputed Facts # 107, 110, 111, 113; Tr. 454-55, 476, 508-09, 518-19, 566.) Indeed, a major objective of some of the counterdemonstrators is to keep Dignity and other gay groups off the steps and sidewalk of the Cathedral during the Gay Pride Parade. (Undisputed Facts # 109; Tr. 413; 567-568).

Two of the main representatives of the Gay Pride Parade counterdemonstrators, generally, have been Andrew McCauley and Herbert McKay, who together in 1982 formed the Committee for the Defense of St. Patrick's. (Undisputed Facts ## 36, 39; Tr.

367-68, 502.) The sole activity of the Committee is to encourage and organize counterdemonstrations at the Gay Pride Parade in St. Patrick's vicinity. (Tr. 345, 506-08.) The Committee has four officers, including Mr. McKay who is President, and Mr. McCauley, who is Vice President. (Undisputed facts ## 33, 34, 37). Its letterhead lists an approximately 30-member Advisory Board, (PX 37), most of whom, however, have never played any active role in the Committee's activities, much less participated as counterdemonstrators at St. Patrick's. (Tr. 505.) In fact, the basic function of the Advisory Board, most of whom Mr. McCauley conceded he has not spoken to "in years," is to have its members' names appear on the Committee letterhead. (Tr. 504-05.)

The Committee for the Defense of St. Patrick's traces its origins to the 1980 Gay



Pride Parade, reports of which provoked Mr. McCauley's interest and ire. (Tr. 506-07.) Observing it himself in 1981 and 1982 and thereafter, McCauley was especially outraged by the graphic irreverence and "Catholic-baiting" he perceived in such behavior as chants implying the Pope was gay, trash cans labelled "Bible depositories," and someone dressed as a nun with a pig's face and wearing a badge saying "child molester." (Tr. 506-07, 517.) McCauley was also particularly upset by the fact that the gay demonstrators had staked themselves out on the steps of the Cathedral, the physical property of the Church. (Tr. 511.) To prevent such "desecrations" and "attacks" on the Cathedral during future Gay Pride Parades, and to safeguard it from being used to "glorify sexual depravity and perversion," or as a stage for "sacrilege" and "blasphemy," McCauley together with his

friend McKay, eventually formed the Committee for the Defense of St. Patrick's. (Undisputed Facts # 35; Tr. 506-08; 562-68.)

While the most violent reactions of McCauley and McKay (and the ones that came up initially and most repeatedly in their testimony) were to the dramatically anti-Catholic histrionics of the non-Dignity demonstrators, (See Tr. 508-11, 513, 517-18), they also find Dignity itself particularly disturbing, and consider its invocation of Catholic symbols and traditions to be "sacrilegious." (Tr. 512, 567-70, 572-73.) Moreover, while the main focus of the Committee has been on the steps of the Cathedral, i.e., to prevent the "takeover of Cathedral property," (Tr. 511-513.) In fact, keeping Dignity and other gay groups off the sidewalk is one of the group's main purposes, and as long as Dignity or other

such groups are not there, the Committee, itself, has no interest in demonstrating on the Cathedral sidewalk. (Tr. 519-20, 573-75, 578, 413.)

Again this year the police intend to freeze the sidewalk in front of St. Patrick's to all persons, including plaintiffs, during the Parade. The Police Department believes that the mere physical presence of Dignity on the sidewalk in front of the Cathedral would be construed by some as a symbolic desecration of the Cathedral and would thus increase the possibility of violence from counterdemonstrators. (Tr. 363-64, 366-67, 373, 376, 413, 454-55; 895-96, 901, 935.)

The sole issue before the court is whether the aforementioned police freeze, as applied to Dignity during the 1986 Parade, can pass constitutional muster. This determination, however, depends largely on the credibility and reasonableness of putative

police fears of violence should Dignity be granted access to the sidewalk this year. In order to assess the credibility and reasonableness of these concerns it is useful to survey the history of the Parade, particularly as regards counterdemonstration activity, but also as it may shed light on any other police motivations in instituting the freeze.

In 1981, as in previous years, the sidewalk and the steps in front of St. Patrick's Cathedral were left open to all demonstrators, including Dignity, for the duration of the Gay Pride Parade. (Undisputed Facts ## 40, 41, 45; Tr. 898-99.) The police designated no separate areas for counterdemonstrators and, in fact, there were no organized counterdemonstration groups at the 1981 Parade. (Undisputed Facts ## 46, 47.) During that Parade, however, two minor incidents

occurred which were targeted at the use of the Cathedral steps by gay demonstrators. (Undisputed Facts # 48; Tr. 350, 135.)

Andrew McCauley was arrested on the steps of the Cathedral for striking the Parade's Grand Marshal as he attempted to lay flowers on the Cathedral steps. Neither Parade participants nor Dignity members incited this incident. McCauley was removed from the steps, held until the Parade ended, and was then issued a summons and released. (Undisputed Facts #49.)

McCauley, who is a middle-aged man, reported that he did not like getting arrested and that he intended in his future counterdemonstrating activities to avoid such scrapes. (Tr. 531.)

Herbert McKay was also arrested during the 1981 Parade for interfering with marchers who were having their picture taken on the steps of the Cathedral with a

Dignity banner. Again, neither Parade participants nor Dignity members incited this incident. McKay was removed from the steps by the police, held until the Parade was over, and then issued a summons and released. (Undisputed Facts # 50.)

In 1982, despite the two incidents at the 1981 Parade, Dignity along with other demonstrators again had access to the sidewalk and steps in front of St. Patrick's Cathedral. (Undisputed Facts # 53; Tr. 898-99.) Moreover, within the Police Department prior to the 1982 Parade there had been no discussion about whether to restrict demonstrators' access to the sidewalk or steps. Approximately 50 police officers were assigned to the Cathedral area. (Undisputed facts ## 54, 55.) Apart from barriers abutting the east side of Fifth Avenue to separate the sidewalk from the line of march, no special barriers were

placed along the sidewalk or steps fronting the Cathedral. (PX 56.)

According to the police estimate, only about 50 counterdemonstrators attended the 1982 Parade. (PX 1, p. 140 (Kerins affidavit, para. 16.) Although both McCauley and McKay were present that year, the Parade saw no incidents of violence. (Undisputed Facts # 56; PX 56; Tr. 582-83, 530-32.)

The year 1983 is, of course, of special interest in the case as the year of the initial police decision to freeze the St. Patrick's sidewalk during the Gay Pride Parade. (Undisputed Facts # 65; Tr. 901.) The freeze prevented Dignity from assembling as it wished on the steps and sidewalk in front of the Cathedral to conduct a peaceful religious service. (Undisputed Facts # 64.) The basis for then Assistant Chief Schwartz's decision was the potential for

violence between pro-gay demonstrators, including Dignity, and "anti-marchers" such as the Catholic War Veterans. (Undisputed Facts # 66; Tr. 349, 901-02.) The Police Department's alleged concern for violence was also significantly informed by its anticipation of the possibly very large numbers of counterdemonstrators (Tr. 139; 897-898, 902) that had been indicated to the Police by counterdemonstration organizers.

Specifically, Assistant Chief Schwartz, the then commanding officer of the area, and Lt. Tarantino had held an apparently routine meeting at the counterdemonstrators' request with McCauley and McKay, among others, in Spring of 1983 to discuss Counter demonstration plans for that year's Gay Pride Parade. (Undisputed Facts #72; Tr. 930, 933; 137-38.) At that meeting according to police testimony, either McKay or McCowley had indicated their expectation

that 25,000 counterdemonstrators would show up at the Parade. (Tr. 138; PX 1, pp. 197-210.) According to McCauley, however, he had only told police that because this was his first year of organizing, he was quite unsure about the crowd he would attract and thus was reluctant to give the Police any estimate of how many counterdemonstrators there might be. Later, in a telephone conversation, McCauley reported, he reluctantly proffered the number 1,000, but only when police insisted. (Tr. 522-23.)

Prior to the 1983 Parade a second significant police planning meeting took place. In years prior to 1983, St. Patrick's Cathedral officials were always attentive to the Gay Pride Parade and to the fact that pro-gay demonstrators were occupying the sidewalk and the steps of the church. (Tr. 49-50, 62.) Though church members had registered complaints from time to time --for



example, Msgr. Rigney, the Rector of the Cathedral, had had several meetings with Mr. McKay, during one of which McKay, accompanied by a police department acquaintance, had expressed his wish that the Church take a less passive posture toward the gay marchers (Tr. 57-58)--church officials had decided not to take any controversial public action. As indicated by internal church memos, however, the 1983 police plan to freeze the St. Patrick's sidewalk was warmly received, (Tr. 68-70, 74-77; PX 124) and not entirely unanticipated.

The cooperative relationship which existed and had existed before is suggested by a memo sent by Rigney to the Cardinal describing a secret meeting he had had with Assistant Chief Schwartz and several other police officers to discuss the 1983 Parade.



Of this meeting Rigney reported to the Cardinal,

They are emphatic that this is a police plan, does not require any request from the Archdiocese. It will be presented throughout as their initiative for the sake of public order. It seems to me that they said the very best we could hope for them to say. . . . They feel they are safe with the basis that it is a police initiative to keep the peace and prevent violence. (PX 124.)

Because the meeting was held prior to the public announcement by the police of the decision to freeze the sidewalk, Assistant Chief Schwartz had specifically requested Msgr. Rigney to keep the meeting and the decision secret. Accordingly, a few days later when a Dignity leader telephoned Rigney to express his unhappiness that the area in front of St. Patrick's had been

entirely closed to demonstrators, Rigney responded that he knew of no such plan. Rigney felt obliged, however, to report this call to the police by sending them a blind copy of a memo he had written describing it. (PX 125; Tr. 126-27.)

The 1983 Parade, itself, proceeded without violence. (Undisputed Facts # 70.) About 100 policemen were assigned to the Cathedral area for the 1983 Parade (Undisputed Facts # 71) and approximately 100 counterdemonstrators were actually on hand to protest. (Tr. 162, 347; PX 1, p. 140; PX 1, pp. 202-03.) An area for counterdemonstrators was designated on the sidewalk on the west side of Fifth Avenue between 49th and 50th Streets, directly abutting the line of march. Assistant Chief Schwartz had placed the counterdemonstrators directly along the line of march specifically so they could see that the



Police Department had kept its promise not to allow gay groups on the sidewalk and steps in front of the Cathedral. (Tr. 914.) The west side of Fifth Avenue from 49th Street to 46th Street was also available as an overflow area for counterdemonstrators who never showed up. These areas were demarcated by wooden sawhorses. (Undisputed Facts # 69; PX 66, 67; Tr. 534.) During the 1983 Parade the police encountered no problem with counterdemonstrators attempting to leave their appointed areas. (Tr. 143; 949-50.)

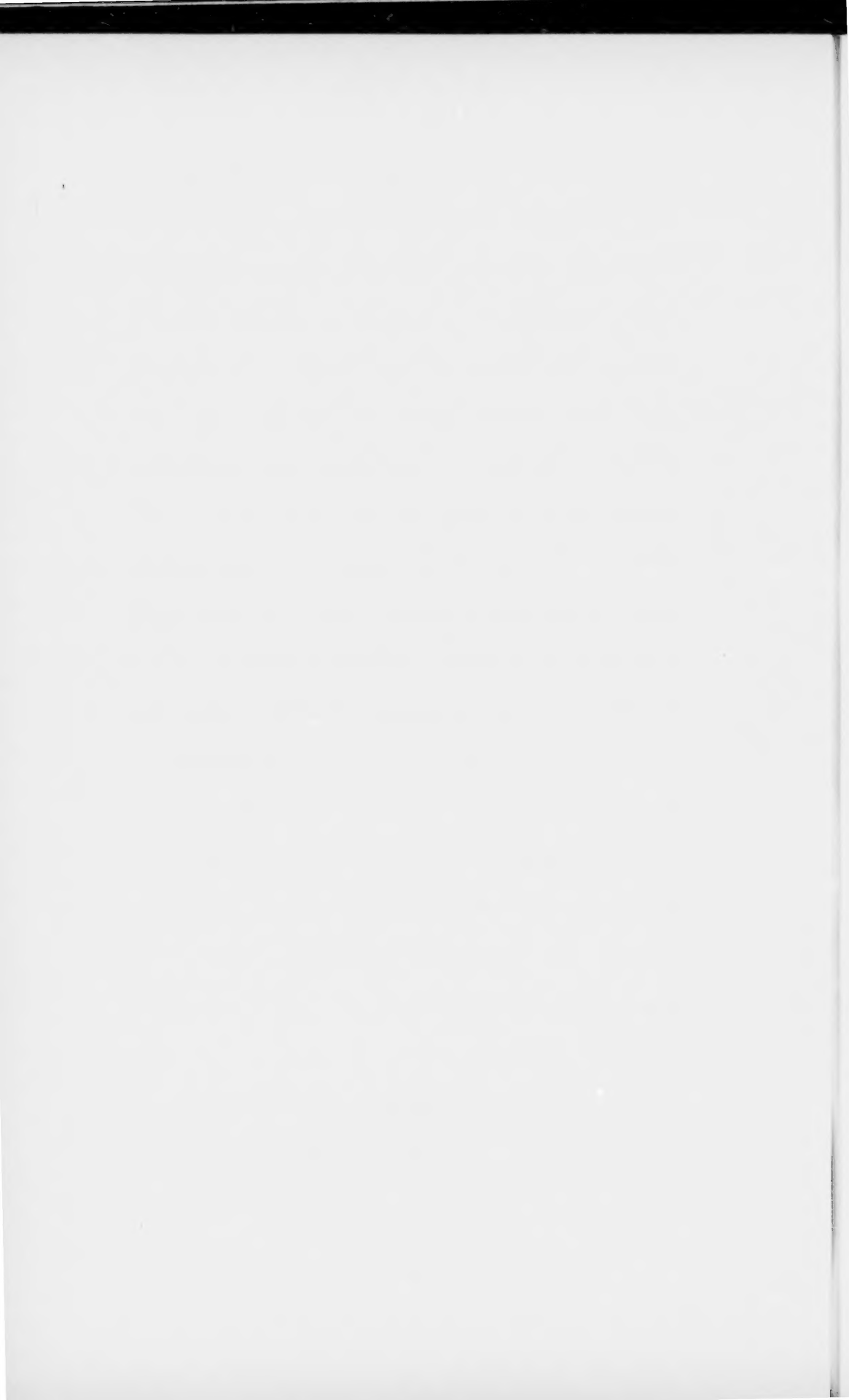
In 1984, the new Assistant Chief for Manhattan Borough South, Chief Kerins, again decided to freeze the Cathedral sidewalk. Kerins' basis for continuing the freeze was essentially the same which had led Chief Schwartz to initiate the freeze in 1983, i.e., a purported risk of violence between the counterdemonstrators and gay

groups seeking access to the sidewalk and Cathedral area. (Undisputed Facts # 77; Tr. 348, 351, 454.) Prior to the 1984 Parade, Kerins and Lt. Tarantino held meetings with representatives of counter-demonstration groups, including McKay and McCauley, to assess their plans for the upcoming event. (Undisputed Facts #76). The counterdemonstrators again predicted large numbers. (Tr. 147.) Based on these discussions the Police Department anticipated that thousands of anti-gay individuals would attend the 1984 Parade. At this meeting in 1984--but prior to any investigation of the figures supplied by the counterdemonstrators (Tr. 150)--the Police Department announced to the counterdemonstrators that the sidewalk would again be frozen as in 1983, (Tr. 147, 150.)

Also prior to the 1984 Parade, the Police Department through Lt. Tarantino,



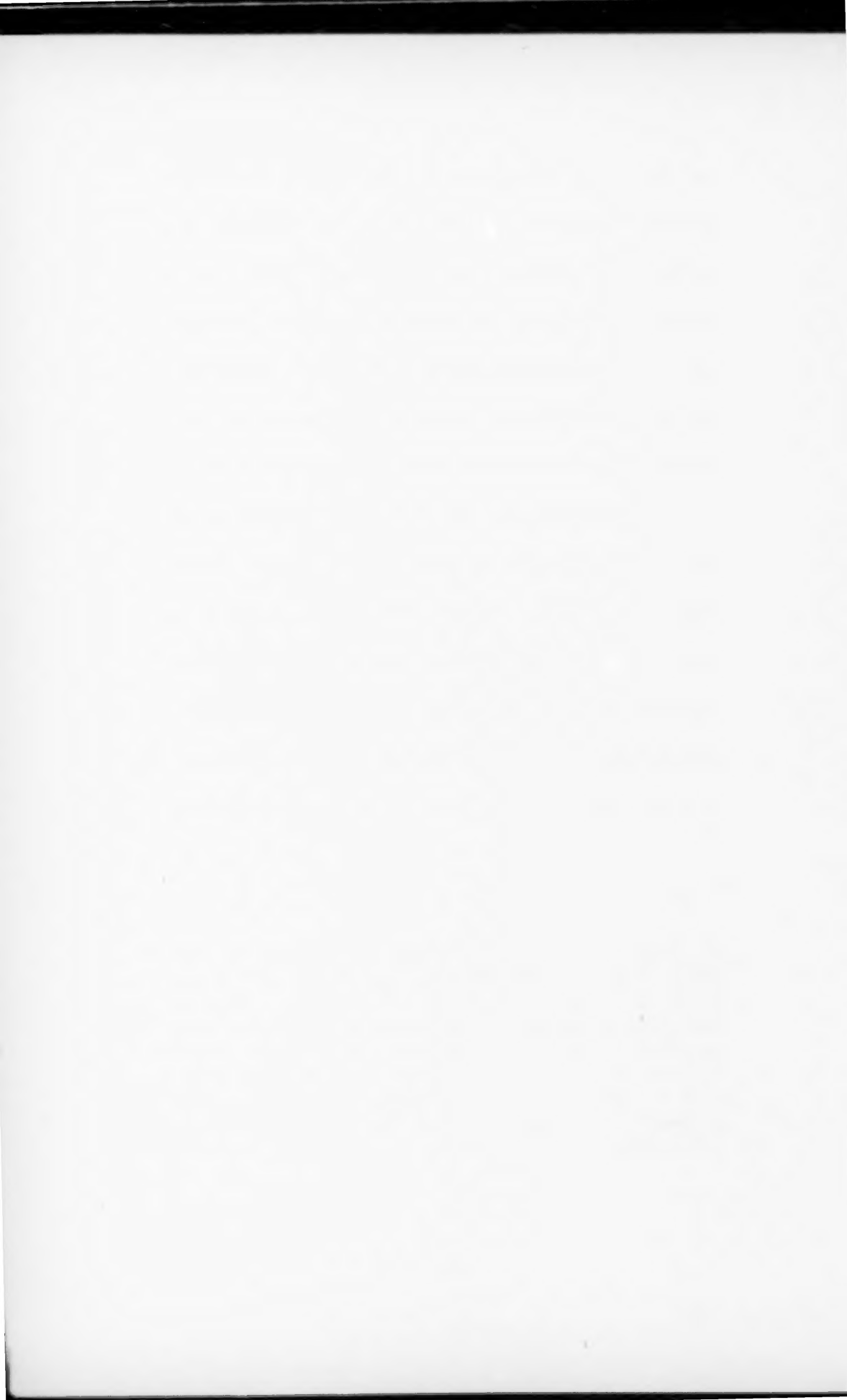
had initiated contact with Msgr. Rigney at St. Patrick's to discuss the as yet only projected sidewalk freeze. Tarantino asked Msgr. Rigney to schedule a church service during the hours of the Parade, explaining that this would make it "easier" for the police to "reply" to the gays who wished to demonstrate in front of the Cathedral. (Tr. 83-85.) Rigney was under the impression from this conversation that a municipal ordinance precluded demonstrations in front of churches or synagogues while religious services were being held. In response to the lieutenant's call (notwithstanding Rigney's and Tarantino's implausible testimony that the suggestion was merely a "joke"), the monsignor passed the idea on to the then-acting Bishop of the Cathedral. (Bishop O'Keefe acted as leader of the diocese in the interim period between Cardinal Cooke's death and the appointment



of Cardinal O'Connor.) The reply from the Bishop was a "wish" that a service be scheduled during the Parade. (PX 127.) Despite incoming Cardinal O'Connor's interest in counterdemonstration efforts,² however, no such afternoon service was ever in fact scheduled to coincide with the parade.

Approximately 20,000 gay marchers in all participated in the 1984 Gay Pride Parade. (Tr. 335 (Kerins); 636-37.) (Although Chief Kerins, in his Affidavit in Opposition to the Motion for Preliminary Injunction filed prior to last year's hearing, stated that there had been an estimated

² Prior to his appointment as head of the New York Archdiocese, Cardinal O'Connor sent a letter received by Msgr. Rigney discussing counterdemonstration efforts and enclosing a flier which described such efforts as they affected the Cathedral. (Tr. 123.) The Cardinal's letter, however, has mysteriously disappeared from Church files. (Tr. 123.)

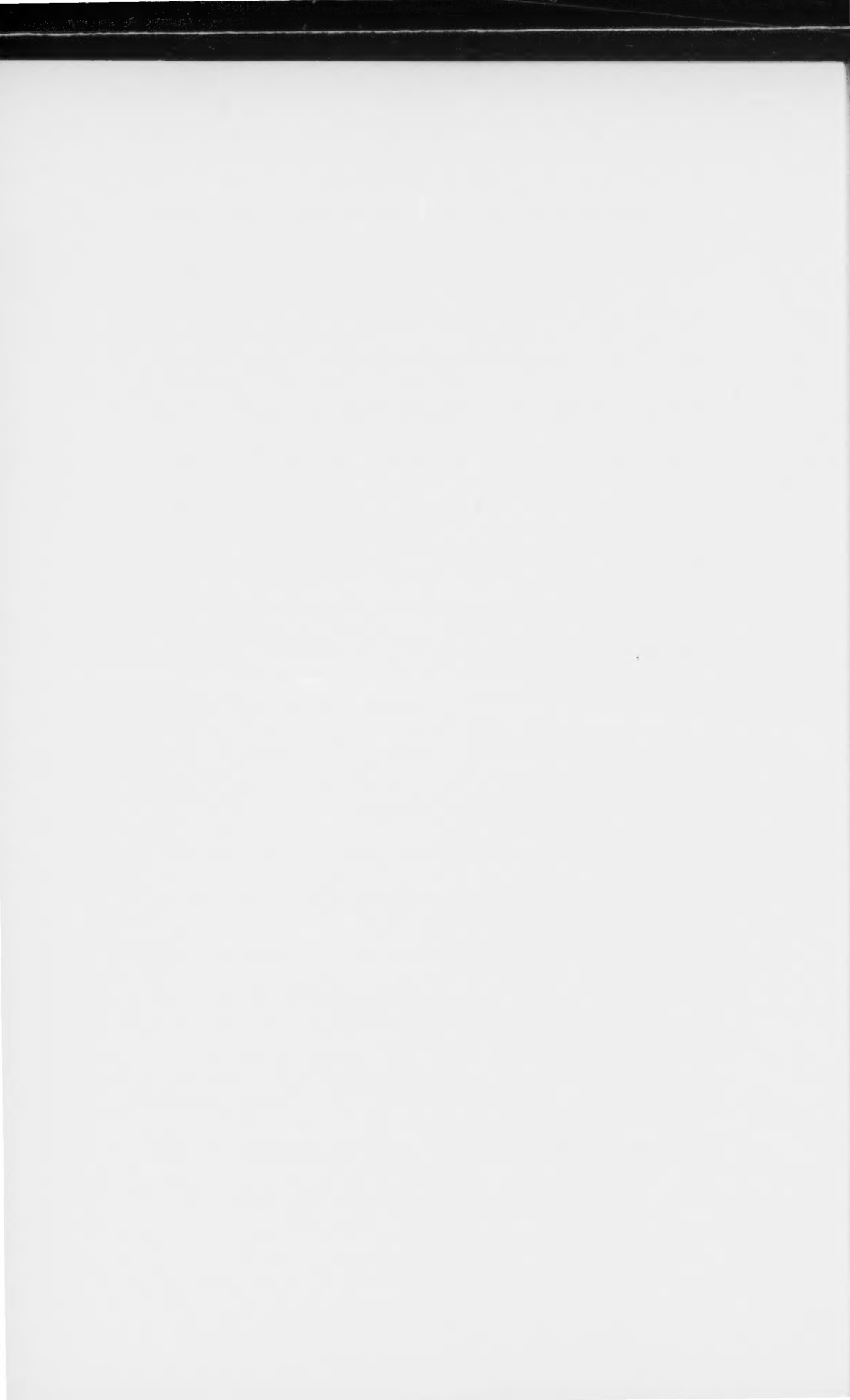


75,000 marchers and that this number was the official police estimate, (PX1, p. 241; Tr. 337), these early estimates were obviously incorrect.) As for counter-demonstrators, only 75 to 100 actually appeared at the 1984 Parade. (Undisputed Facts # 81, PX 42.)

During the 1984 Parade the counterdemonstration area was changed to an area diagonally southwest across the street from St. Patrick's, about 150 feet from the center of the Cathedral sidewalk. (See Tr. 444.) This area was set back into 50th Street about 10 feet behind the building line. (Undisputed Facts ## 78, 79.) Chief Merins designated no area for counterdemonstrator overflow. (Tr. 345-46.) In all, approximately one hundred policemen were assigned to the Cathedral area in 1984. (Undisputed Facts # 83.)



According to Lt. Tarantino, who was generally present in the Cathedral area during the 1984 Parade, (Tr. 151-152), four or five counterdemonstrators may have strayed from the counterdemonstration area onto the adjacent sidewalk along the west side of Fifth Avenue. However, they returned to the official counterdemonstration area without any argument or violence when requested to by police. (Tr. 30-31, 153-54, 393-94, 441.) Even when they left the counterdemonstration area, it should be noted, these counterdemonstrators remained a significant distance from the line of march, separated from the avenue by a row of police officers and police sawhorses. (Undisputed Facts # 79.) Furthermore, apart from verbal requests to return to their designated area, the police, only a handful of whom were assigned to monitor the counterdemonstration area, did not find it necessary to make any



special efforts to keep the counter-demonstrators within the assigned 50th Street space. (Tr. 30-31.)

In 1984 the police permitted Dignity, who was marching in the Parade, to stop the line of march for ten to fifteen minutes in order to conduct a religious service on Fifth Avenue in front of the Cathedral. During that service two Dignity members were permitted by the Police Department to step briefly off the avenue onto the Cathedral sidewalk and lay a wreath on the sidewalk. (Undisputed Facts # 84.) The counter-demonstrators made no attempt to stop or interfere with this ceremony or the wreathlaying while it was occurring. (Undisputed Facts # 85; Tr. 155, 369, 394-95.) In fact, during that entire 1984 Parade there were no incidents of violence from counterdemonstrators. (Undisputed Facts # 82; Tr. 31; 153-54).

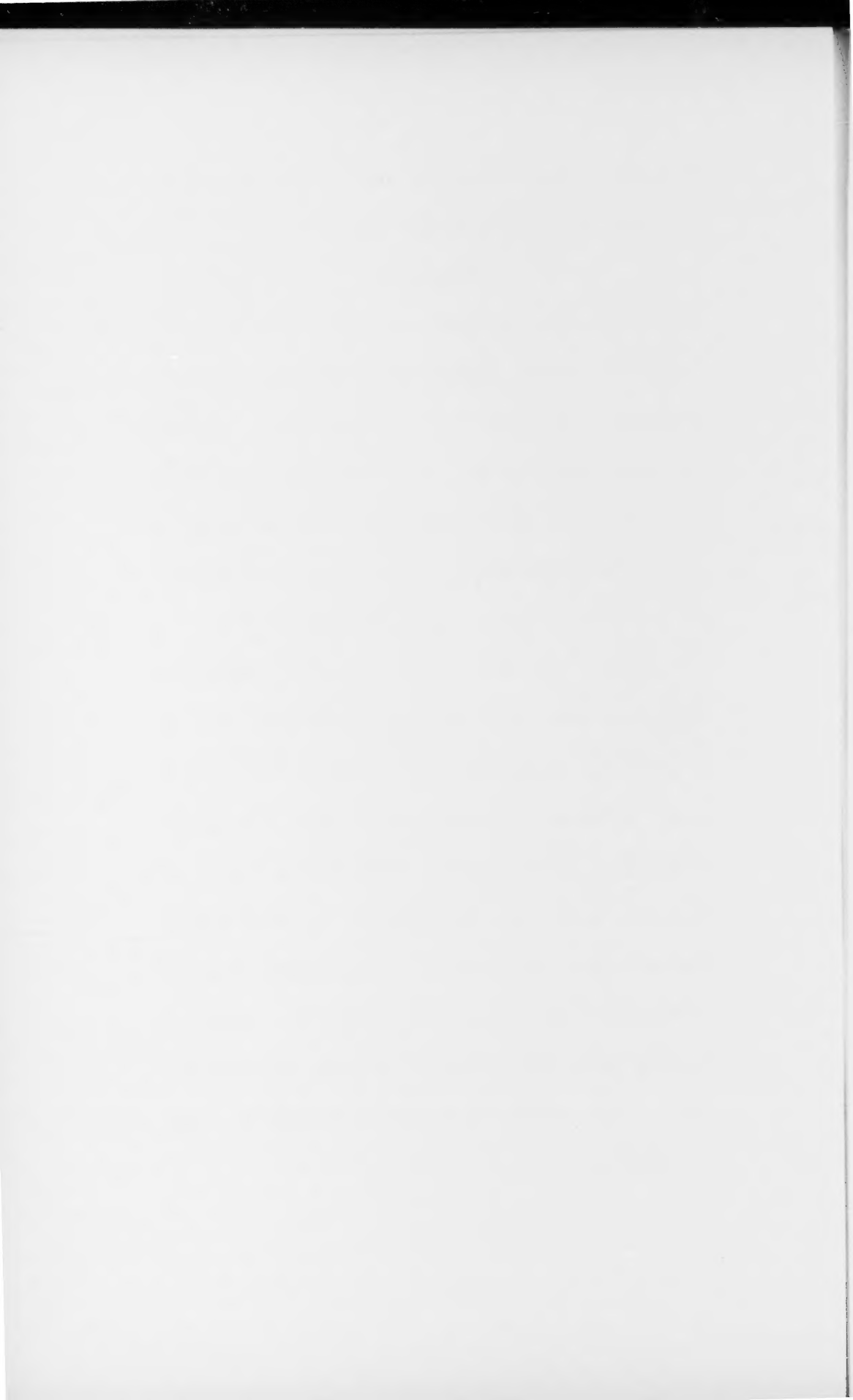


Last year, in 1985, the Police Department again decided to freeze the sidewalk in front of St. Patrick's. (Undisputed Facts # 94.) The purported basis for the continuation of this policy was the same as that given in 1983 and 1984, i.e., the possibility of violence between counterdemonstrators and gay groups demonstrating on the Cathedral sidewalk during the Parade. (Undisputed Facts # 95; Tr. 349, 351-52, 454.) In Lt. Tarantino's judgment, at least, the potential for violence at the 1985 Parade was no different from what it had been at previous Gay Pride Parades during his tenure as head of the operations unit for Manhattan Borough South from 1981-1984. (Tr. 166.) The police again grounded their fear of violence in the predictions of counterdemonstrators with whom they had met earlier in 1985. (See Undisputed Facts # 91.) McKay and/or



McCauley had estimated that there would be "thousands" (Undisputed Facts # 120), or at least "large numbers" of counter-demonstrators present at the 1985 Parade, "several times" over the previous year's showing. (PX 20; Tr. 157-58, 173). Based on these discussions, Lt. Tarantino reported that he felt the potential existed for a counterdemonstration turnout of "thousands" at the 1985 Parade. (Tr. 164-165.)

Prior to the 1985 Parade plaintiffs brought this law suit and moved for a preliminary injunction forbidding the police from barring Dignity from the Cathedral sidewalk. After finding that police fears of violence were too speculative to reasonably support the restriction, the court ordered defendants to submit a plan for allowing Dignity onto the sidewalk during the Parade. (PX 1, pp. A472-73 (court's order of June 13, 1985).)



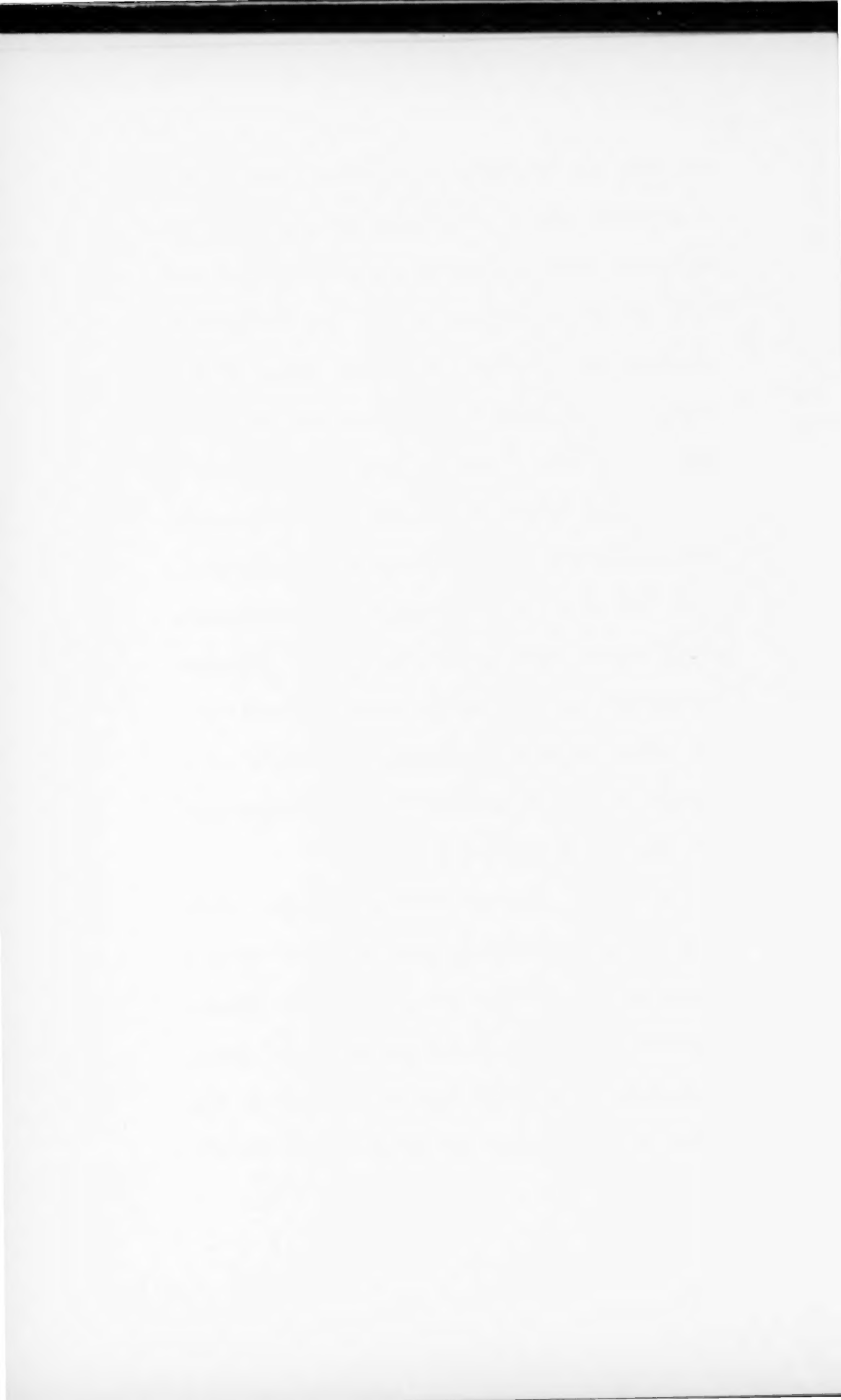
Accordingly, the police department drew up a plan that would have allowed about fifty to one hundred Dignity members on the sidewalk directly in front of St. Patrick's in a barricaded pen area. The Dignity members who had been chosen to so demonstrate would gather prior to the Parade in an assembly area adjacent to the Cathedral on 51st Street. (Tr. 94-95, 396-99; PX 129; see also, Tr. 241-44, 491-95). Inexplicably, on the day the proposed order was due, the court was not informed by defendants of the numbers which this plan entailed. At this point the court directed the police to allow a reasonable number of Dignity demonstrators on the sidewalk during a reasonable period of time during the Parade. (PX 1, pp. A498-99 (court's order of June 18, 1985).)

After the Court of Appeals vacated this court's order that Dignity must be allowed



on the St. Patrick's sidewalk, the police proceeded with a demonstration plan for the area that was essentially identical to the one followed the previous year. As in 1984 a counterdemonstration area on 50th Street west of Fifth Avenue, set back ten feet from the building line, was designated. (Undisputed Facts # 96, 97.) No area was designated for counterdemonstrator overflow. (Tr. 345-46.) In 1985 counterdemonstration areas were delineated by steel "French barricades" as well as by wooden sawhorses, the police department having just acquired a supply of the innovative French barricades. (Tr. 391, 394; PX 191.)

In the weeks preceding the 1985 Parade, the police had planned on a second counterdemonstration area at 47th Street patrolled by ten mounted police for a group of Hassidic Jews who had announced to the police their intention of blocking the Parade



at this juncture. (Tr. 391-92.) When insufficient numbers of Hassidim turned out, however, to justify a separate counterdemonstration area, they were placed along with the other counterdemonstrators in the 50th Street location. (Tr. 25-26; 269; PX 191.) Moreover, the Hassidim never attempted to carry out their threatened blockade. (Undisputed Facts # 99.) Furthermore, during the 1985 Parade none of the counterdemonstrators left the designated area. (Tr. 391; 28.)

The 1985 Gay Pride Parade was generally uneventful. Fewer than 20,000 participants marched in it (Undisputed Facts # 88; Tr. 335) and of these only about 9,225 actually passed by the Cathedral. The remaining marchers joined the Parade farther south towards Greenwich Village and never came into the Cathedral area. (Tr. 339, 436; PX 84.) The court finds that the



Parade took approximately two hours to pass a single spot in 1985 (Undisputed Fact # 17). Although Chief Kerins testified that the Parade took approximately three hours to pass the Cathedral (Tr. 435), the Parade count performed by the police in 1985 (PX 84) indicates that the Parade reached the Cathedral at 1:10 PM and ended at 2:53 PM. The number of marchers who occupied a single block at any one time during the Parade varied from about 150 to 600. (Undisputed Fact # 18; Tr. 340-41.)

The court finds that at most, 140 to 150 counterdemonstrators appeared at the 1985 Parade. (Tr. 19-25; PXs 184, 186, 190, 191). Although the police have stated that 250 counterdemonstrators appeared in 1985, none of the police officers who testified actually performed a count. (Tr. 341, 347, 268-69.) There is, therefore, no affirmative evidence to support the police figure of 250.

Mr. Foreman who testified to a number of about 150 counterdemonstrators, explained that he had actually counted them, and described the method he used to do so. In any event, Police Department photographs of the 1985 Parade indicate that the 140-150 figure determined here by the court is, if anything, generous. The court notes that even were it to accept the 250 figure, this would in no way change the outcome of this case.

As in 1984, in 1985 one hundred officers were assigned to the Cathedral area. (Tr. 438; PX 102.) Two hundred fifty police officers were assigned to the area on Fifth Avenue between 52nd Street and 48th Street. (Tr. 438-39; PX 102.) Also, as in 1984, Dignity was permitted to conduct a brief religious service in front of St. Patrick's by stopping in its line of march for a short period and also laying a wreath on

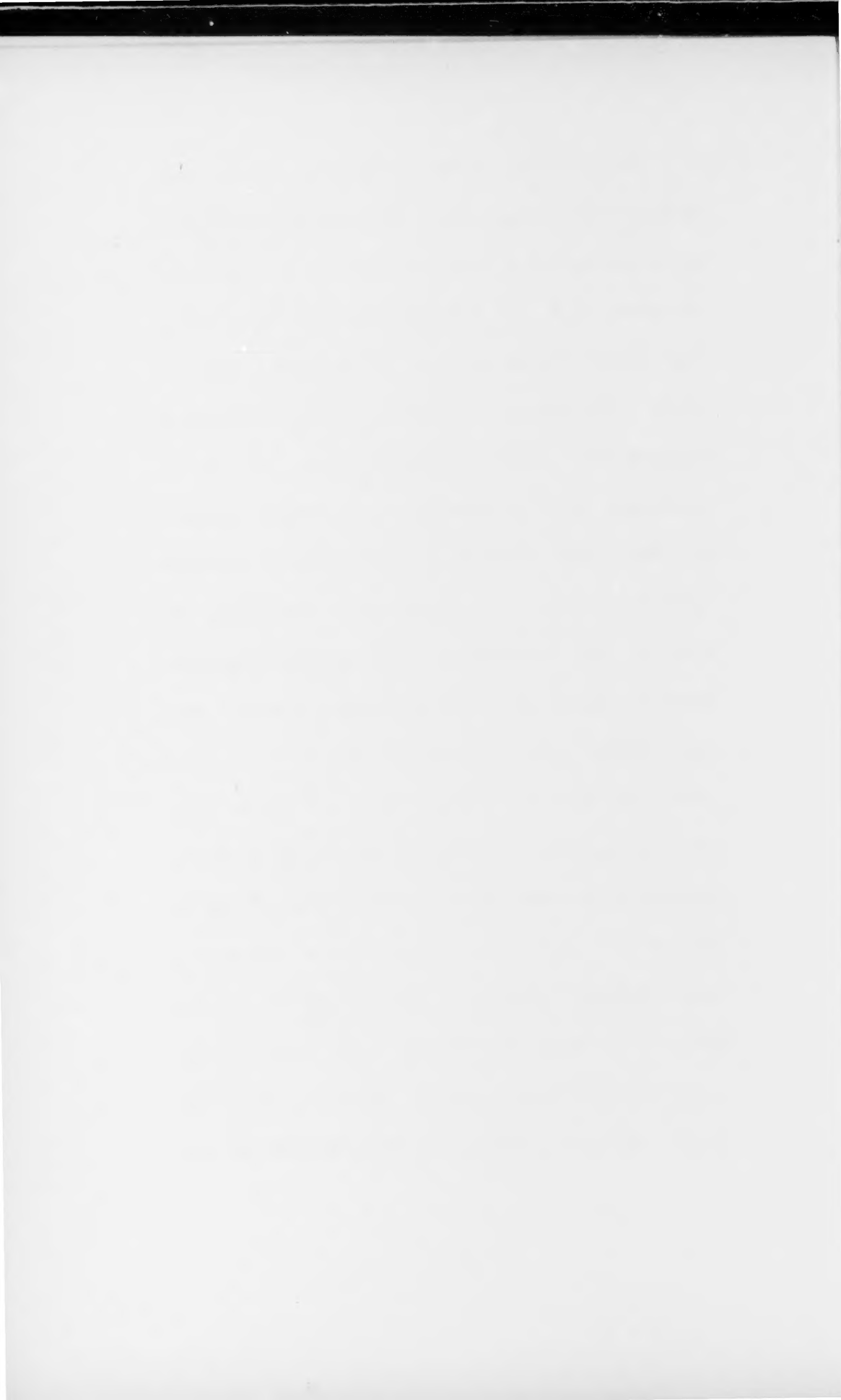


the Cathedral sidewalk. (Undisputed Facts # 92.) During the 1985 Parade no incidents of violence took place. (Tr. 17; PX 205.) Indeed, the subsequent police report on the Parade documenting the lack of violence accordingly recommended a 15-20% reduction in the 1986 police detail. (PX 205.)

The Police Department expects in all approximately 20,000 people to march in the 1986 Parade. (Tr. 334.) The police also report they have no reason to expect any more marchers will actually pass the Cathedral in 1986 than in 1985, i.e., fewer than 10,000. (Tr. 339.) For 1986 Chief Kerins again intends to freeze the sidewalk fronting St. Patrick's Cathedral based on his perception that there is a serious risk that counterdemonstrators might react violently to the presence of Dignity on the disputed sidewalk. (Undisputed Facts # 105; Tr. 351-54; 454-55.)



For the 1986 Parade, counter-demonstrator organizers McCauley and McKay have estimated a counterdemonstrator turnout of about 1,000. (Undisputed Facts # 106.) The court takes notice, of course, that at trial McCauley offered his "educated speculation" that perhaps two or three thousand counterdemonstrators might appear at the 1986 Parade. McCauley's revised estimate since his deposition, however, is due to the possibility that certain Hispanic demonstrators who had protested against the Gay Rights Bill at City Hall earlier this year, as well as certain demonstrators who had turned out in large numbers at Lincoln Center to protest the film "Hail Mary," might decide to join the Gay Parade counter-demonstrator group. (Tr. 528-29.) As discussed separately below, the court finds such speculation specious because the Hail Mary protest was entirely unrelated to



homosexuality. To the extent that the so-called Hispanic group might increase the anti-gay count at this year's Parade, the court finds this to be essentially irrelevant to this case since it is gays and the Parade in general, rather than Dignity's use of the Cathedral sidewalk, which appear to incite this group's wrath.

The Police Department Rationale for Freezing the St. Patrick's Sidewalk in 1986.

As noted by Police Chief Kerins public sidewalks are not closed by police during parades unless there is some particular reason to take such a measure. (Tr. 351.) The sole justification given by the Police Department for again closing the Cathedral sidewalk to Dignity in 1986 is the purported risk of violence from irate counter-demonstrators who would be specifically provoked by Dignity's presence on the sidewalk. (Tr. 360, 386-87; Tr. 285.) The

police distinguish this special risk from the risk created by the general hostility between counterdemonstrators and Parade marchers in general (Tr. 454-55.)

The court finds and concludes that the police plan denying Dignity access to the sidewalk in front of St. Patrick's is directly related to the symbolic message that Dignity wishes to convey by demonstrating there, i.e., that there can be harmony between homosexuality and Catholicism. In arriving at this conclusion, the court necessarily rejects the police contention that the potential for uncontrollable violence from counterdemonstrators, or some standard and reasonable police practice, rather than police sensitivity to counterdemonstrator wishes and pressures, is the underlying reason for the sidewalk freeze.

The Police Department decision to remove gay demonstrators from the Cathedral



sidewalk originally, and this year to deny Dignity permission to use the sidewalk was made precisely to allay objections of anti-gay and anti-Dignity counterdemonstrators. (Tr. 386-87, 476; 895-96, 902, 908-09.) The Police Department believes that barring Dignity from the Cathedral sidewalk during the Parade would decrease the potential for violence by minimizing the pointedness of counterdemonstrator opposition. (Tr. 385-87.) The police concede that if counterdemonstrators did not consider Dignity's presence on the sidewalk a desecration of the Cathedral, there would be no reason for the freeze. (PX 218, pp. 166-67.) In determining whether Dignity's presence in a particular location amounts to a provocative desecration in the eyes of the counterdemonstrators, Chief Kerins, who mandated the freeze this year, relies not only on the statements of the counter-



demonstrators, but also on his independent evaluation of the history of the Gay Rights Parade and his past experience with these counterdemonstrators. (Tr. 373-74, 377.)

The effect of the Police Department's decision to close off the St. Patrick's sidewalk during the Gay Pride Parade has been subtly to favor the religious views of the counterdemonstrators at the expense of Dignity's and to communicate the impression that the police are in fact siding with the counterdemonstrators. (Tr. 616-19, 10-11.)

As communicated to Chief Schwartz by counterdemonstrators McKay and McCauley, when the decision to freeze the sidewalk was first taken in 1983, they felt they had won an important victory since their view and objectives had prevailed. (Undisputed Facts # 60; Tr. 578-79.) Counterdemonstrators have expressed their satisfaction with the continuation of the sidewalk freeze in later

years including, they hope, this one, noting that simply keeping Dignity and other gay demonstrators off of the area in front of St. Patrick's has always been one of their major objectives. (PX 1, p. 205.)

The court specifically rejects defendants' arguments that its decision to keep Dignity from the Cathedral sidewalk is a content neutral product of standard police policy concerning controversial demonstrators. The court finds that the allegedly standard police practice of keeping antagonistic demonstrators out of sight and sound of each other is not really a standard practice at all, and in any case would not be violated by allowing Dignity on the Cathedral sidewalk. There appears to be no police document or manual describing such a "standard" police practice (see PX 213). There is no mention of it made in police training programs. Instead, this practice,



which is obviously a sensible one in some situations, is not automatic but depends on the circumstances. (Tr. 417; See Tr. 913.)

The Police Department can itself, recall only five occasions when the allegedly standard practice of separating antagonistic groups has been put to use since January 1, 1980. Of these, two were police invocations of the "practice" during previous Gay Pride Parades. (PX 214.) On another of the five occasions involving a demonstration at the Eighth Street Playhouse, anti-gay Orthodox Jews and pro-gay demonstrators were in fact positioned by the police within sight and sound of each other. (Undisputed Facts # 116; Tr. 419-20.) Disregarding the extremely vague testimony offered at trial about the use of this "standard practice" during presidential visits, (Tr. 418, 674) which in any case raise additional national security concerns clearly not present during



the Gay Pride Parade, this leaves only two purported occasions since 1980 when this "standard" police policy was actually invoked.

Even were this court to accept defendants' contention that a "standard police policy" of separating antagonistic groups in fact exists, this policy would by no means require the exclusion of Dignity from the St. Patrick's sidewalk. Instead, the alleged policy could be satisfied merely by placing the counterdemonstrators a sufficient distance away from Dignity, something that would in fact be the case if Dignity were allowed on the sidewalk and the counterdemonstrators placed, as always, in their West 50th Street counterdemonstration area. Further undermining the allegation that a standard policy of the sort alleged here even exists, is the location in past Gay Pride Parades, as well as in the projected

1986 Parade, of the anti-gay counter-demonstrators in 50th Street well within sight and sound of the pro-gay marchers passing along the Parade route generally.

The police also contend that the decision to keep Dignity off the Cathedral sidewalk comports with another allegedly standard police practice. This is the practice of closing St. Patrick's sidewalk during certain other parades, for example, the annual St. Patrick's Day Parade. This argument is embarrassingly feeble since the sidewalk "freezing" during other parades occurs for reasons entirely different from those which prompt police to freeze the sidewalk during the Gay Pride Parade. During other parades the Cardinal and other Church hierarchy review the marchers from the steps of the Cathedral. There are no barriers separating or cutting off the sidewalk from the avenue, moreover, and



parade participants are free to step out of their line of march in order to greet the Cardinal personally where he stands on the sidewalk.

It cannot be seriously contended that the policy of freezing the Cathedral sidewalk during certain other parades which are observed and blessed by the Cardinal from the Cathedral steps should help explain, as somehow "standard", the police practice of closing the sidewalk during the Gay Pride Parade.

Furthermore, as to the allegedly standard policy of freezing St. Patrick's sidewalk during other parades, Police Chief Kerins has conceded that even if a group hostile to the Cardinal's appearance in front of the Cathedral on the public sidewalk voiced some protest, he would not respond by freezing the sidewalk entirely. Instead, he would simply assign the hostile

demonstration group a counterdemonstration area on 50th or 51st Street. (Tr. 421-22.)

The court also rejects the suggestion that a contributing factor in the decision to keep Dignity off the St. Patrick's Cathedral sidewalk is a standard police policy of keeping demonstrators away from the line of march. The police policy, if it indeed exists, would only reasonably apply to hostile demonstrators. Even as to hostile demonstrators, moreover, the police do not always implement this policy. This is evidenced by their decision in the 1983 Gay Pride Parade to place hostile counter-demonstrators directly along the Parade route. As to the presence of Dignity on the sidewalk, the police appear to have no concern that it will somehow interfere with the progress of the Parade. The mechanics of granting Dignity access to the St. Patrick's sidewalk would not require the

opening of the police barriers along the Parade route. Dignity sidewalk demonstrators could easily enter and leave their assigned area from 51st Street, well away from both the marchers and counter-demonstrators.

The major police rationale for closing the sidewalk to Dignity and its members during the 1986 Gay Pride Parade is, of course, the stated concern of the police department that to allow Dignity on the sidewalk would substantially increase the risk of violence during the Parade. Neither the history of the Parade nor any of the factors which the police contend materially alter the counterdemonstration potential for this year's Parade, convince the court that the police concern for violence is in any way credible or reasonable.

Naturally there is a potential for violence in any large demonstration involving



controversial and emotional issues. Yet the Police Department has not produced any convincing evidence to show that its concern for violence in the Gay Pride Parade, were Dignity to be allowed on the Cathedral sidewalk, is any different from the possibility of violence inherent in any controversial public gathering. The hostility between gays and counterdemonstrators at the Parade, even that which might be provoked by the blatantly anti-Catholic manifestations of certain demonstrators not at all affiliated with Dignity, has historically been kept under control by the Police. (Tr. 169-70.) The court finds that the potential for violence from demonstrators, either individually or in groups, is highly speculative and, at any rate would be controllable by the police using routine good planning and procedures.

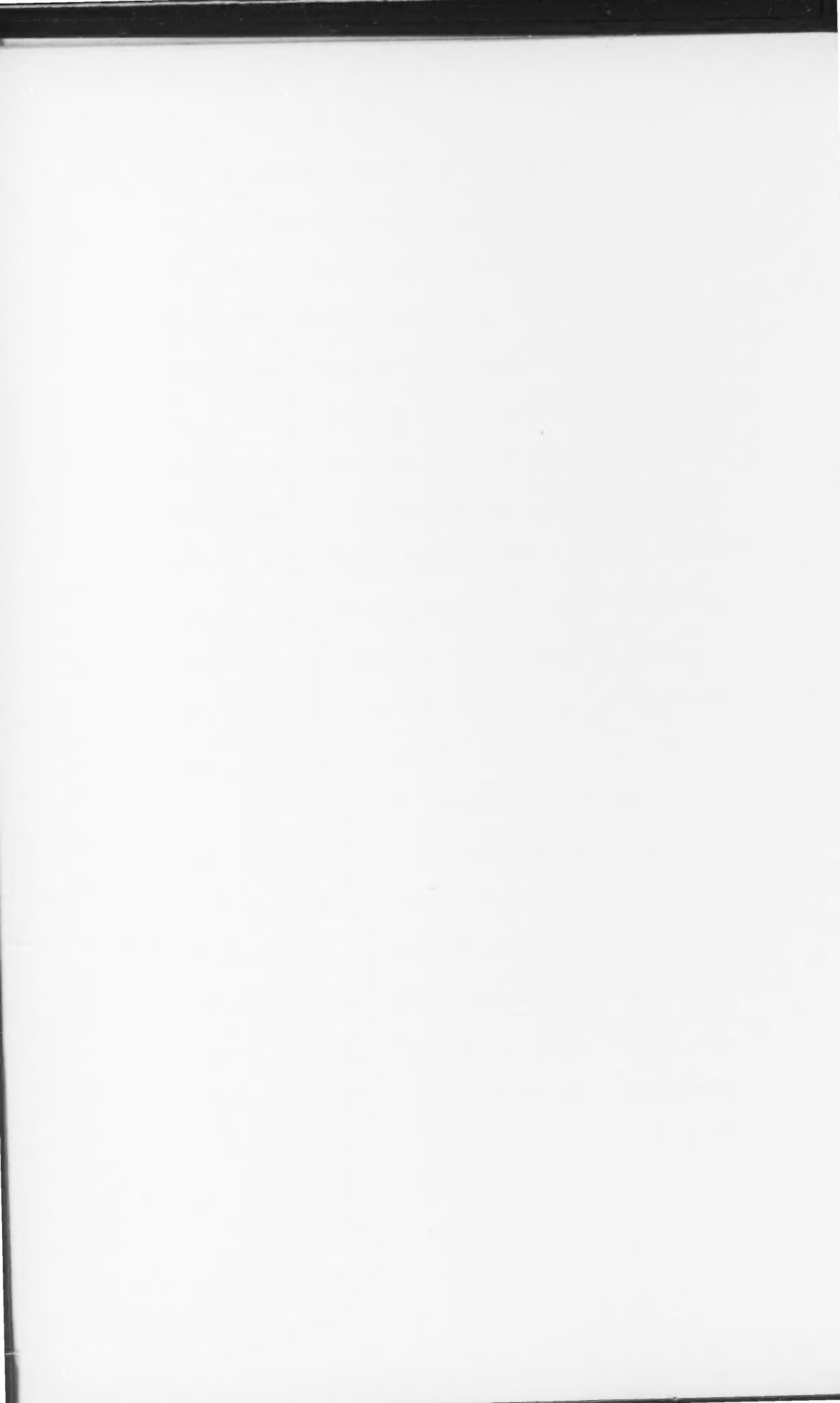


The various specific police concerns for violence in the 1986 Parade are drastically undermined by a clear-eyed survey of the Parade's counterdemonstration history. Other than the minor incidents involving McKay and McCauley individually at the 1981 Parade, there has been no evidence of violence in the history of the Parade. (Undisputed Facts ## 40, 41, 56, 70, 82, 99.)

Police suggestions that counterdemonstrators might attempt to leap police barriers on West 50th Street, and physically assault police officers, marchers, and pedestrians in order to reach Dignity, across the street and half a city block away, are not even vaguely substantiated by past Parade experience with anti-gay demonstrators. In the history of the Parade, no counterdemonstrators has breached the line of march. (Tr. 28, 143, 153-54, 391, 393-94,



441, 949-50.) The 1984 incident of "counterdemonstrators overrunning the barriers," described by Chief Kerins at trial, turns out upon closer examination to be not proved. Because the police that year had not informed them of the decision to allow Dignity its Fifth Avenue prayer service and wreath laying ceremony, (Undisputed Facts # 86), counterdemonstrators McKay and McCauley apparently spoke to members of the press outside the demonstration area, complaining that the police had failed to "level" with them. Then after the last Parade group had passed the Cathedral, the two men visited with Lt. Tarantino to say they were upset about not having been told of the ceremony beforehand. (Undisputed Fact # 87.) Neither McKay nor McCauley nor any other counterdemonstrator ever attempted to interfere with Dignity's



ceremony. (Tr. 369, Undisputed Facts # 85.)

The Police Department also points to the use of "provocative words" at prior Gay Pride Parades as an indication that a serious potential for violence exists this year. Provocative words, however, as well as such symbolic expressions of disdain by counter-demonstrators as the shaking of rosaries and the hoisting of crosses (Tr. 28), have been exchanged at every Gay Pride Parade in the past, yet have not led to violence. The Police Department lacks any reason, moreover, to think that such words and hostile emotions will cease or be much allayed if Dignity is kept from the Cathedral sidewalk. (Tr. 379.) The potential for violence from provocative words is something with which the police will have to deal regardless of whether the sidewalk is frozen.

To the knowledge of the Police Department, counterdemonstrators have not thrown objects at Parade participants or at Dignity members during prior Parades, even though they were close enough to do so. (Undisputed Facts # 126; Tr. 392.)

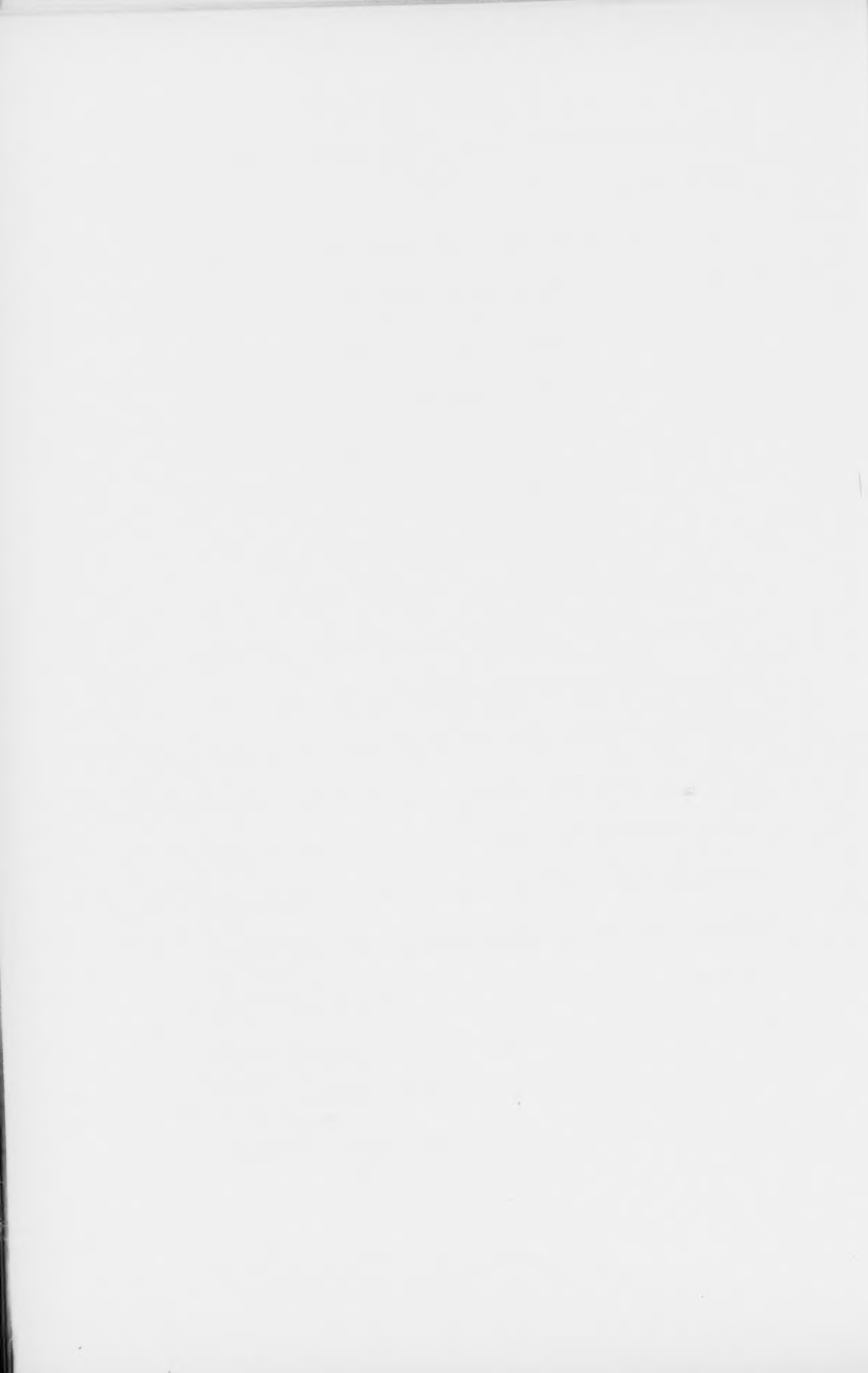
As to the possibility of large scale, uncontrollable riots at the Gay Pride Parade should Dignity be allowed on the Cathedral sidewalk, the court finds it has no reasonable basis. To begin with, the court must emphasize that the number of persons marching past the Cathedral last year and the year prior was in fact much, much lower than was originally thought at the time plaintiffs' preliminary injunction motion was considered by this court and the Court of Appeals. While Commissioner Ward had estimated 75,000 marchers (PX 1, pp. 359-62), police figures from 1985 indicated that little over nine thousand Parade

participants marched past St. Patrick's.
(PX 84.)

Dignity members or other gay groups in the Gay Pride Parade themselves offer an insignificant potential for violence. The Police Department considers the history of a group's behavior in determining whether the group would be likely to incite violence. (Tr. 355.) Neither Dignity nor any other group in the Parade has ever instigated violence in the Parade. (Tr. 355.) Members of Dignity bear no particular hostile animus to the counterdemonstrators. (Tr. 32-33.) In the past Dignity has invited counterdemonstrators to meet with them independently of the Parade to discuss their differences. (Tr. 9-10.) Moreover, several members of Dignity are themselves also members of such organizations as the Catholic War Veterans to which some

counterdemonstrators reportedly belong.
(Tr. 32.)

Predictions of large scale riots are most significantly undermined by the nature of the counterdemonstrators, themselves, both those who have appeared in the past and those who might turn out this year. As Chief Kerins, himself, testified, the intention of most counterdemonstrators is to demonstrate peacefully. (Tr. 480.) Gay Pride counterdemonstrators--and the groups involved this year are significantly the same or similar--have always contacted the police before a demonstration. (Tr. 478.) The police understand this as an indication of the generally law-abiding, rather than violent or radical, nature of these individuals and their groups. (Tr. 480.) At each of the meetings counterdemonstrators have had with police prior to past Gay Pride Parades, the police received assurances that protest



activities would be peaceful and police orders followed. (Tr. 521.)

Both Mr. McCauley and McKay, remarkably steadfast opponents of Dignity's access to the sidewalk and of the Gay Parade generally, testified that they would of course obey police orders at the Parade and appeared genuinely startled and insulted when asked if they would consider resisting police commands by physical violence. (Tr. 520-21, 581-82, 588.) McCauley also testified that, from his experience with counterdemonstrators at past Gay Pride Parades, he had no reason to believe that if Dignity were on the Cathedral sidewalk during the 1986 Parade, counterdemonstrators would attempt to remove it or to interfere with its ceremony. (Tr. 522.) Chief Kerins, himself, testified that he did not believe there was any real possibility that counterdemonstration groups opposed to

Dignity would attack police officers. (Tr. 410-11.) There is no evidence of counterdemonstrators having had, much less displayed, weapons at the Parade. (Tr. 169) The basically law-abiding nature of the counterdemonstrators as described even by the police is entirely consistent with the approximate age of the most of them, their largely suburban and outerborough residences, and their church-going and middle class character. (See PX 186; 191; 188; 210; Tr. 527; 537; 538; 704; 184; 224-225; 233; 704).

The diverse religious makeup of the anti-gay counterdemonstration groups at past Gay Pride Parades or anticipated to attend in 1986 further tends to belie the reasonableness of police fears that Dignity's presence on the Cathedral sidewalk in 1986 would significantly increase the risk of violence. The Police Department, itself, admits there

is no reason to fear that the Orthodox Jewish counterdemonstrators who have consistently protested at the Parade, would be especially upset or even concerned by Dignity's presence on the sidewalk. (Tr. 375-76.) The same goes for Protestant counterdemonstrators (Id.). The probable indifference of Protestants to Dignity's presence on the Cathedral sidewalk, as opposed to such counterdemonstrators' outrage at the Parade in general, is highly significant this year because one of the major new contingents of possible counterdemonstrators the police are focusing on is a Hispanic group consisting mainly of evangelical Christians. (Tr.529-30.)

Defendants explain their anticipation of violence this year, and thus their decision again in 1986 to close the St. Patrick's Cathedral sidewalk to Dignity, by the assertedly strong likelihood this year that a

significantly larger number of counterdemonstrators than ever before will attend the Parade. It is not entirely clear that this contention is relevant to any justification for the police restriction at issue here, since to a large extent the numbers of counterdemonstrators who might be present in 1986 would not especially affect the potential for violence as it relates to Dignity, whether on the sidewalk or off. However, to the extent that the police contention of a large counterdemonstrator increase reasonably relates to the prudence of allowing Dignity on the Cathedral sidewalk, the court must assess this contention.

To begin with, the court notes that the history of predictions of the counterdemonstrator attendance at Gay Pride Parades is one of striking and consistent exaggeration, both by the counterdemonstrators,

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themselves, and especially by the Police Department. The Police Department apparently relies in great measure upon the representations of the counterdemonstrators as to the number who will appear each year. (Tr. 281; 139-40; 897-98.) In determining the potential counterdemonstration figure, the Police Department has failed to ascertain or even consider the membership figures for the groups predicted to appear, or even how in many from each have on fact showed up at past Parades. (Tr. 344-45.) Each year since 1983, "thousands" of counterdemonstrators have been predicted. Never have more than approximately 150 actually appeared.

With regard to both past and present predictions by counterdemonstrator organizers, the court finds that the Police Department's stated reliance on these figures to assess the risk of violence and thus keep



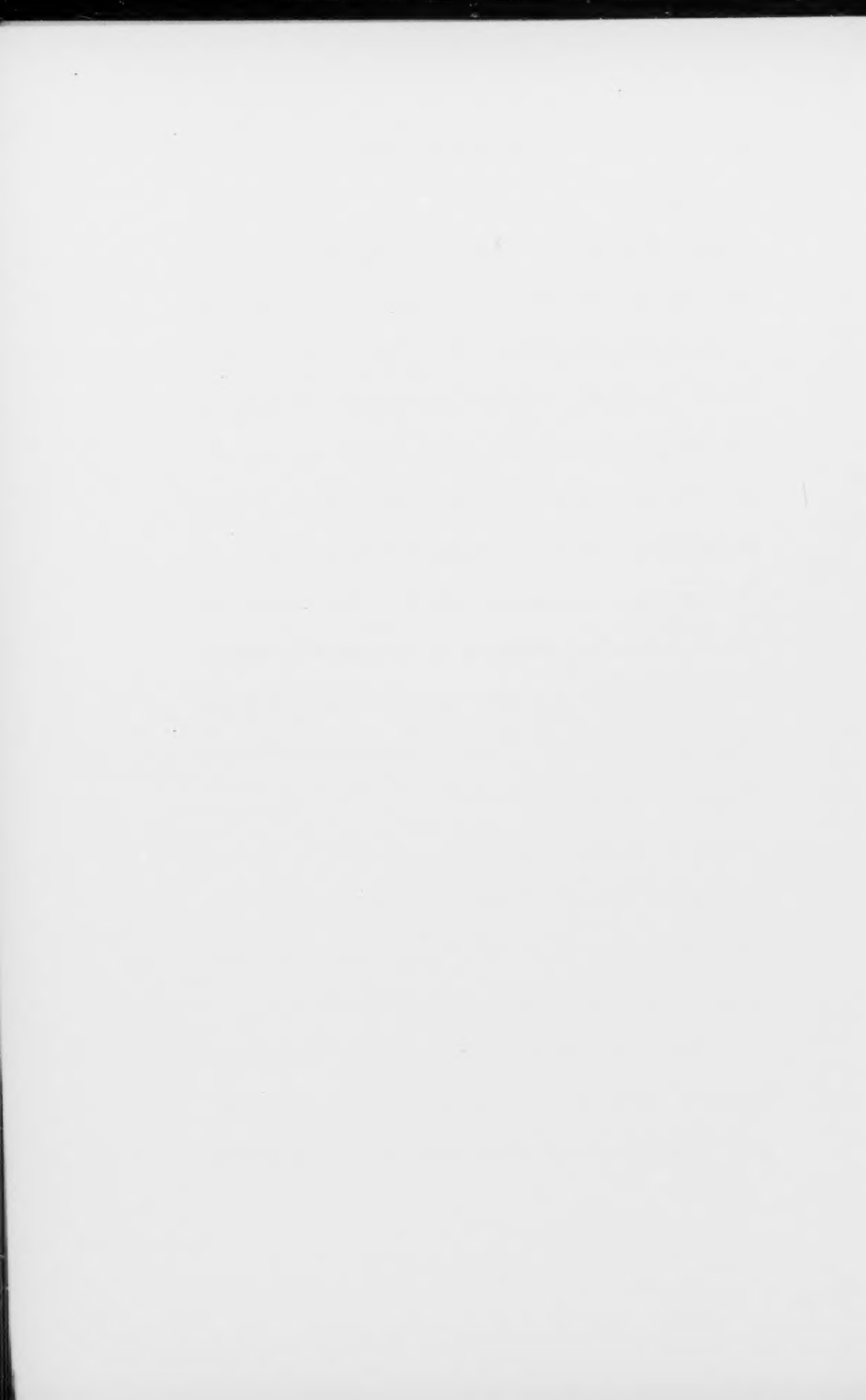
Dignity off the St. Patrick's sidewalk, gives such individuals as McCauley and McKay every motive to exaggerate their predictions. Another factor relied upon by the police in the past to predict large numbers of counterdemonstrators was a large mailing by the Committee for the Defense of St. Patrick's sent to the Knights of Columbus and others, urging attendance at the Parade in 1983. (Tr. 139; 928; see Tr. 524; Undisputed Facts 73.) As McCauley, himself, admitted, the results of this mailing were disappointing, for only a few Knights of Columbus were rallied. (Tr. 524-25.)

The Police Department claims that it expects an exceptionally large counter-demonstrator turnout in 1986 based on certain new groups who have become interested in protesting homosexuality, as well as a general upsurge in anti-gay motivation among previously participating



groups. The week before the trial in this case began, Lt. Tarantino was instructed by Chief Kerins to contact eight different groups to see if they were interested in counterdemonstrating at this year's Gay Pride Parade. (Tr. 427-28.) Tarantino contacted or attempted to contact the leaders of these groups by telephone from Wednesday, May 7, through Friday, May 9. The groups contacted were: The American Society for the Defense of Tradition, Family and Property; Keep the Faith; "Father Witkins's group"; the Baysiders; Rabbi Yehuda Levin's group; the Coalition to Preserve Family Life (also referred to as the "Hispanic group"); the Catholic League for Religious and Civil Liberties; and the state Knights of Columbus. (Tr. 184; PX 210.)

Some of these groups were contacted because they had appeared at past Parades, and some because they had been suggested



by Mr. McCauley as potential demonstrators for 1986. Others were contacted merely because they had appeared at a demonstration at Lincoln Center a few months earlier to protest the film "Hail Mary," a sacrilegious treatment of the incarnation and the life of the Virgin Mary, having nothing to do with homosexuality. (Tr. 427-29, 462-64, 481-82; 679-80.)

Only one of the groups contacted, Rabbi Levin's group, indicated a definite intention to counterdemonstrate at the 1986 Gay Pride Parade. Rabbi Levin stated that his group would demonstrate in about the same numbers as in 1985. (PX 210; Tr. 221-22.) Of the other groups on his list, Lt. Tarantino was unable to contact two (the Knights of Columbus and the Baysiders), and two others reported that they would not counterdemonstrate (Father Witkins's group and Keep the Faith). The remaining two



groups, the "Hispanic group," and the Catholic League for Religious Rights, responded that they had not decided whether to attend the Parade, but that if they did decide to demonstrate they might be able to turn out nearly 10,000 each. (Tr. 185-86.)

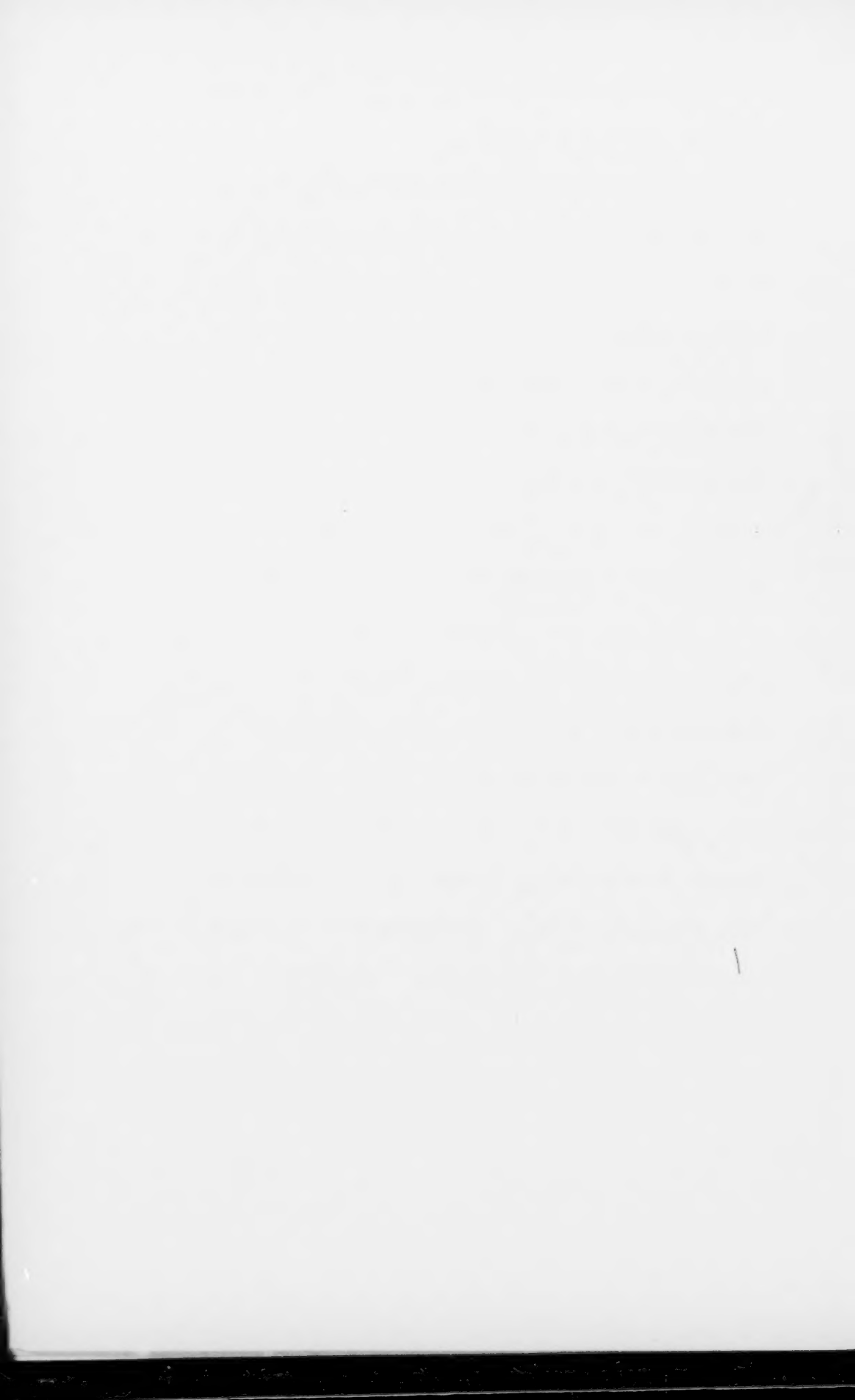
None of the groups contacted by Lt. Tarantino indicated any particular desire to demonstrate in the Cathedral area even if they do decide to demonstrate. (Tr. 205, 212). Moreover, of the eight groups, only Rabbi Levin's, the Baysiders, and some members of the Knights of Columbus have ever demonstrated at the Parade before. (See Undisputed Facts # 32; Tr. 212.)

With regard to the investigation by Lt. Tarantino described above, the court finds a certain appearance of impropriety. Although Chief Kerins claimed that Mr. McCauley had identified the groups appearing at "Hail Mary" as possible counterdemonstrators,

McCauley recalls no such conversation with Police Department officials prior to the time Lt. Tarantino contacted him the week before trial. (Tr. 537-39.) Moreover, the Police Department contacted the leader of one group, Fr. Witkins, with whom McCauley had never spoken. (Compare Tr. 430 and PX 210 with Tr. 536.) The court finds that the unusual police procedure of initiating contact with groups that had no history of appearing at the Gay Pride Parade (see Tr. 515 (Keep the Faith)), and which the counter demonstrators, themselves, had not yet contacted, calls defendants' good faith and motives into question. Moreover, though Lt. Tarantino was eager to touch base with these groups for the benefit of the court in this proceeding, (Tr. 197-8), he made no attempt in his conversations with their representatives to garner information that might substantiate the bald predictions of potential

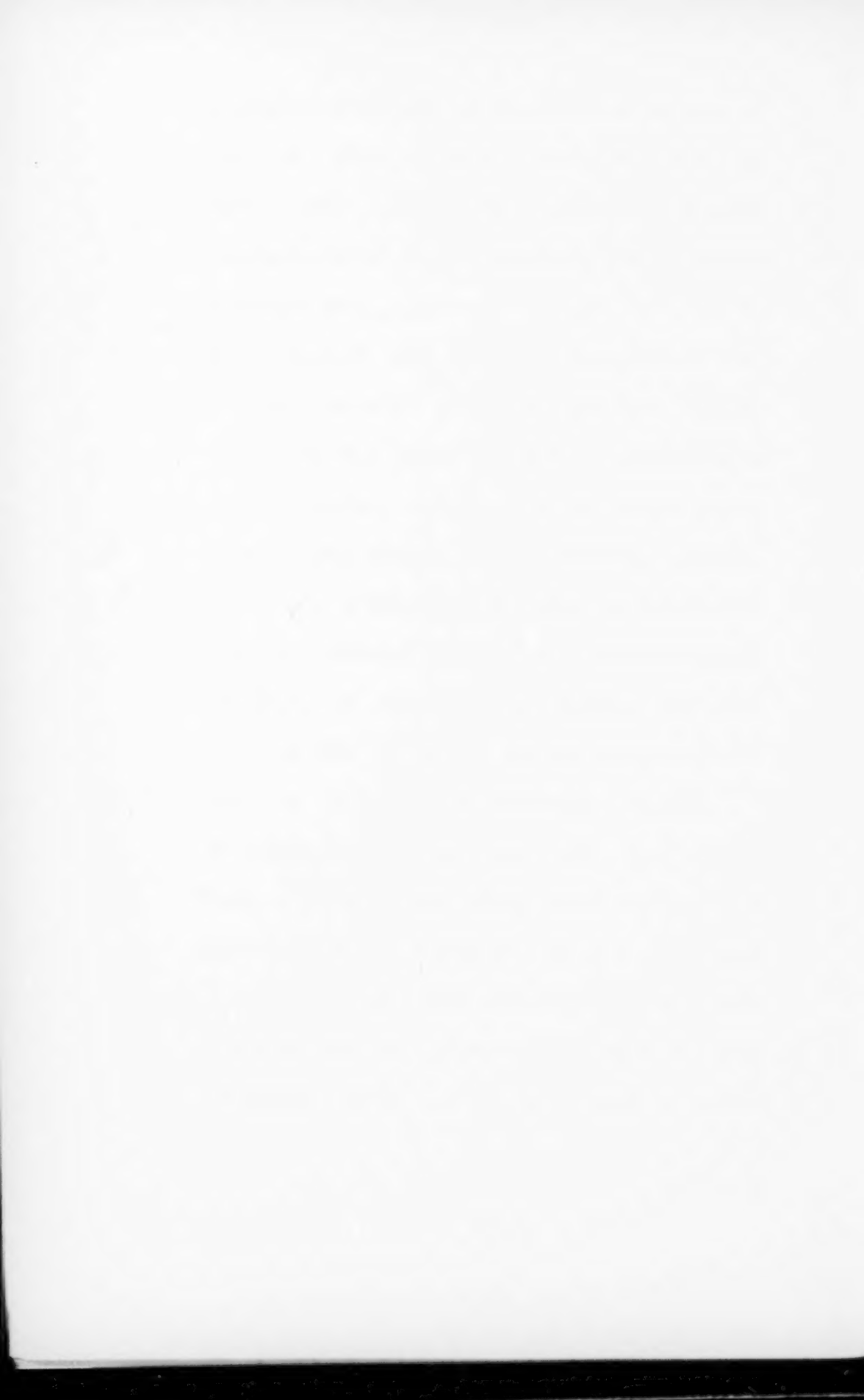
counterdemonstrator turnout. (Tr. 200, 204-05, 208-09, 211-12.)

In predicting notably larger numbers of counterdemonstrators in 1986 than have ever appeared at past Gay Pride Parades, the police place particular emphasis on the potential attendance of the Baysiders and Hispanic group. (Tr. 463, 483.) The Baysiders, however, have already been present at past Parades, at least to the extent they were able to muster participants. (Tr. 526.) The Hispanic group, which appeared among a larger group of 2,000 demonstrators protesting the signing of a Gay Rights Bill at City Hall earlier this year (Tr. 529-30) are, as mentioned before, mostly Protestant. There is no evidence that even if this group appeared in large numbers at the 1986 Parade, it would be directing its opposition to Dignity as opposed to the Parade in general, nor that it would



be any more offended by Dignity's presence on the Cathedral sidewalk than by the Hispanic group at the City Hall demonstration inviting people to demonstrate at the 1986 Gay Pride Parade, was directed not at Dignity, but at the Parade as a whole, and its band of "100,000 militant homosexuals." (DX A.) (Tr. 486-89.) The great store placed by the police in this random leafleting of pedestrians seems unfounded in light of McCauley's own prior disappointment with the results of his targeted mailing to hundreds of potential counterdemonstrators. (See Tr. 524-25.)

Other considerations offered by the police both this year and in the past to substantiate their belief that Dignity's presence on the St. Patrick's sidewalk would significantly aggravate the risk of violence from counterdemonstrators, do not actually relate to Dignity or its use of the sidewalk,

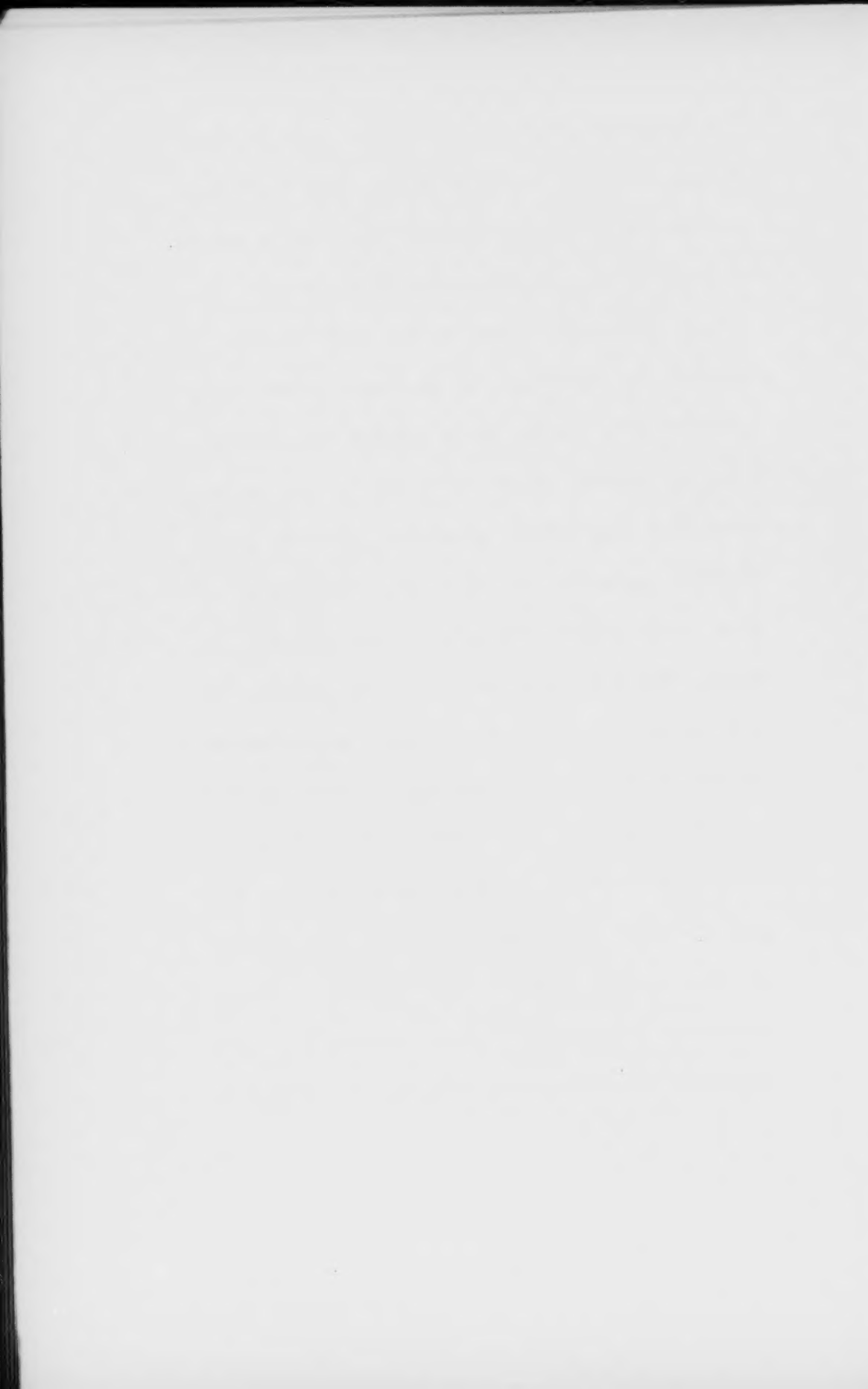


but rather to anti-gay, anti-Parade hostility generally. These considerations do not create any greater potential for violence at the 1986 Parade than they or their counterparts created in past Parades. For example, the fact that lawsuits were brought in 1983 by counterdemonstration groups seeking to enjoin the entire Gay Pride Parade (see PX 1, p. 140; Tr. 361-62) offers little indication of the potential for violence in 1986 due to Dignity's presence on the Cathedral sidewalk.

The public controversy attending the passage of the New York City Gay Rights Bill this year also offers little basis for predicting any special risk of violence during this year's Parade, much less any risk that would be aggravated by granting Dignity access to the Cathedral sidewalk. The question of gay rights has been a public issue in New York for at least 17 years.



(Undisputed Facts # 121; Tr. 382.) The Roman Catholic Archdiocese of New York has publicly spoken out against gay rights since at least 1980. (Undisputed Facts # 122; Tr. 7-8.) Moreover, prior to the 1985 Parade, it should be recalled, a perhaps even more controversial public issue pitting the Catholic Church against gays surfaced in the City's proposed regulation requiring Church social service agencies to hire gay employees or else lose public funding. See Olivieri v. Ward, 766 F.2d 690, 693 (2d Cir. 1985). In any event, to the extent that controversial issues in the public spotlight, such as the Gay Rights Bill or AIDS, would heighten animosity between counterdemonstrators and gay groups, they will do so in the context of the entire Gay Pride Parade. Thus, whatever potential for violence they engender must be dealt with by the police in



any case, regardless of whether the sidewalk is frozen to Dignity.

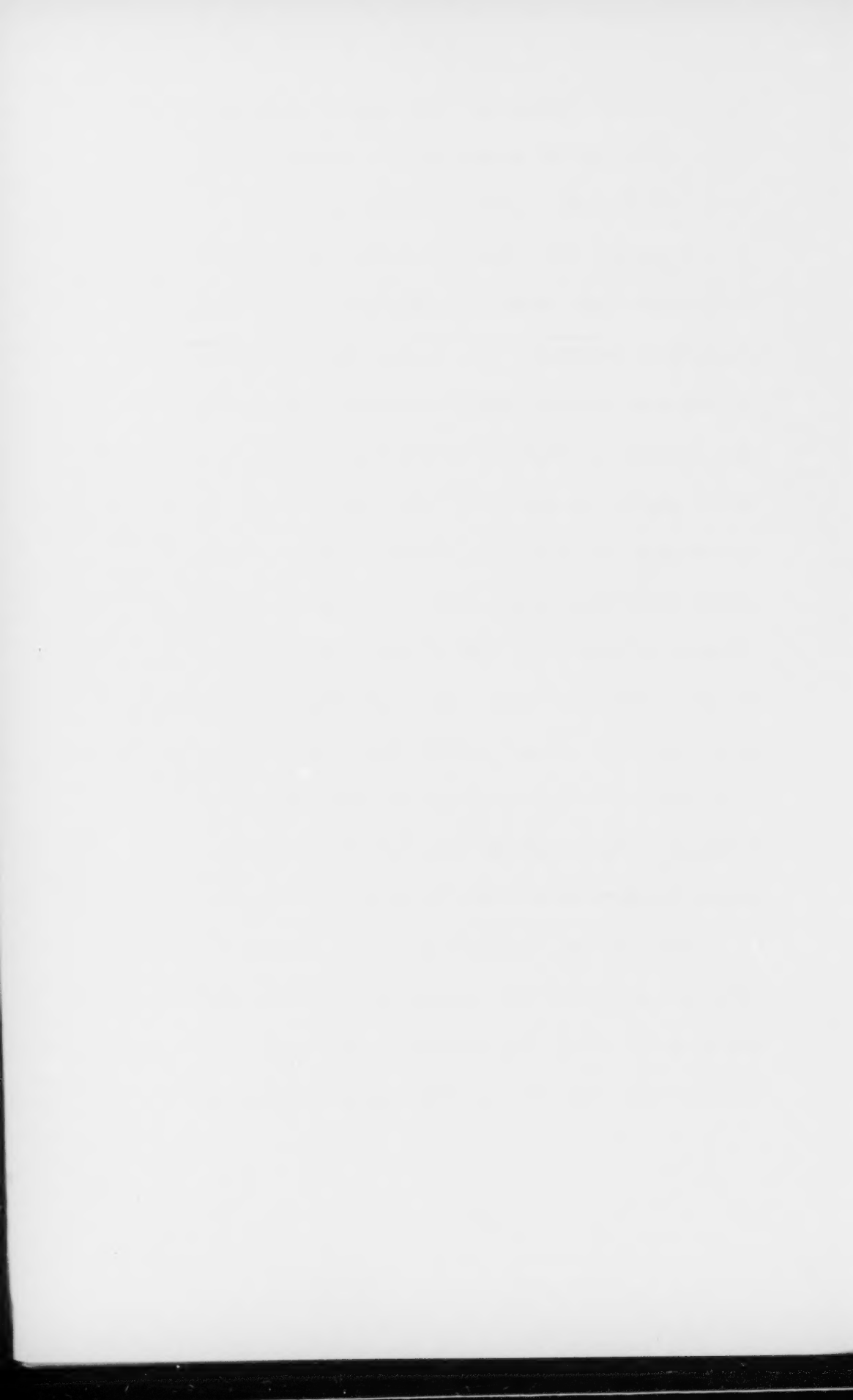
Most impressive to the court in concluding that any large scale threat of violence at the 1986 and other Gay Pride Parades cannot reasonably be related to whether or not Dignity is granted access to the Cathedral sidewalk, is the testimony of chief counterdemonstrators McCauley and McKay. When pressed, both men stated their indignation at Dignity, but the initial and most vociferous reactions of the two men were directed at the Parade generally, and especially at the grossly irreverent floats and signs in no way associated with plaintiffs, (Tr. 619), for example, the crucifix in a trash can, the nun with a pig's face, and the garbage "depository" for Bibles. (Tr. 506-07, 517-18; 581, 619.) Moreover, although McCauley, McKay and other counterdemonstrators appear to have



been deeply disturbed by these displays, they have never attempted to remove them from the Parade. (Tr. 517-518; 565.)

Finally, to justify their challenged restriction this year on Dignity's use of the Cathedral sidewalk, the police have pointed to several recent demonstrations concerning gay issues, or else involving Catholic groups who might conceivably be interested in protesting at the Gay Pride Parade. The court concludes that analogy to these other demonstrations is of limited value since there is no evidence that any of the groups involved in them would be particularly provoked by Dignity's use of the Cathedral sidewalk, the symbolic act which the police argue is especially likely to trigger violence.

The Police Department, for example, offered evidence of demonstrations in the vicinity of City Hall earlier this year to protest the Gay Rights Bill, as indicative of

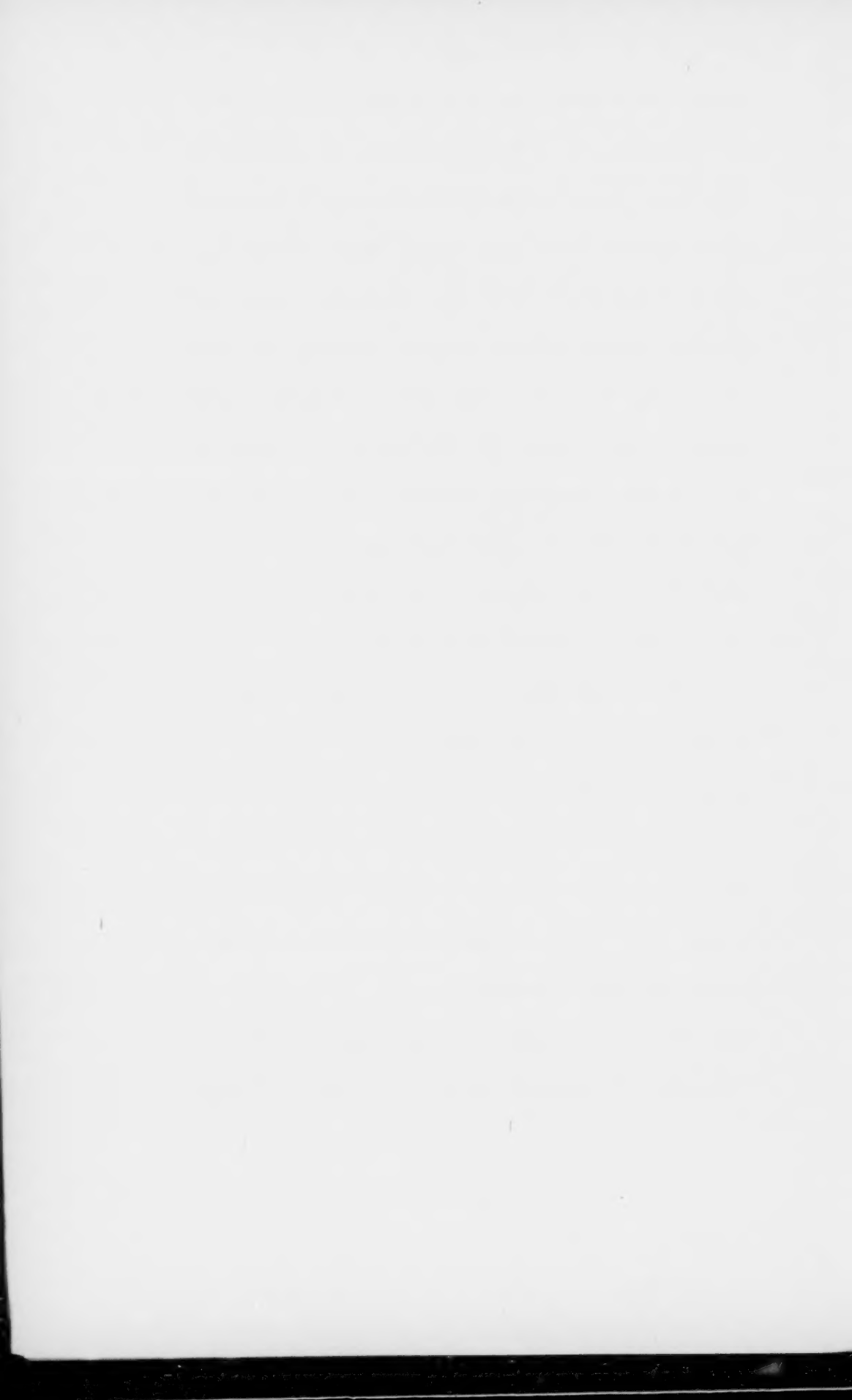


the increased possibility of violence should Dignity be granted access to the Cathedral sidewalk. (Tr. 342-43; 461-63; 186). This City Hall demonstration, however, protested homosexuality and gay civil rights generally. Furthermore, it involved no violent incidents. (Tr. 189.)

The police place particular emphasis on the Lincoln Center "Hail Mary" demonstration occurring in October 1985. They contend that this event is strong evidence of the potential for vast numbers of counterdemonstrators at this year's Parade. They point to it as well as support for the proposition that even the most mild and suburban of crowds can turn ugly without warning. As the court has already noted, the relevance of the "Hail Mary" demonstration is somewhat strained since the movie in question had nothing to do with gays or gay rights. (Tr. 679-80; 482; 540.) The court simply

cannot conclude that the substantial turnout of Catholics at a demonstration to protest a film that they believed contained a sacrilegious portrait of the Virgin Mary (see Tr. 462-3, 341-343) can be logically used to predict counterdemonstrator turnout at the Gay Pride Parade. The court, however, will weigh this event as evidence of how a supposedly peaceful demonstration can get out of control--a risk that will, of course, always exist where any emotional and controversial subject is at issue.

The "Hail Mary" demonstration occurred in the side street adjacent to the small plaza in front of Alice Tully Hall and was attended by Catholics objecting to the film's blasphemous treatment of the Virgin Birth. The group had been largely organized by the leader of the Catholic League for Religious and Civil Liberties. A contingent of the "Baysiders" group also appeared. These

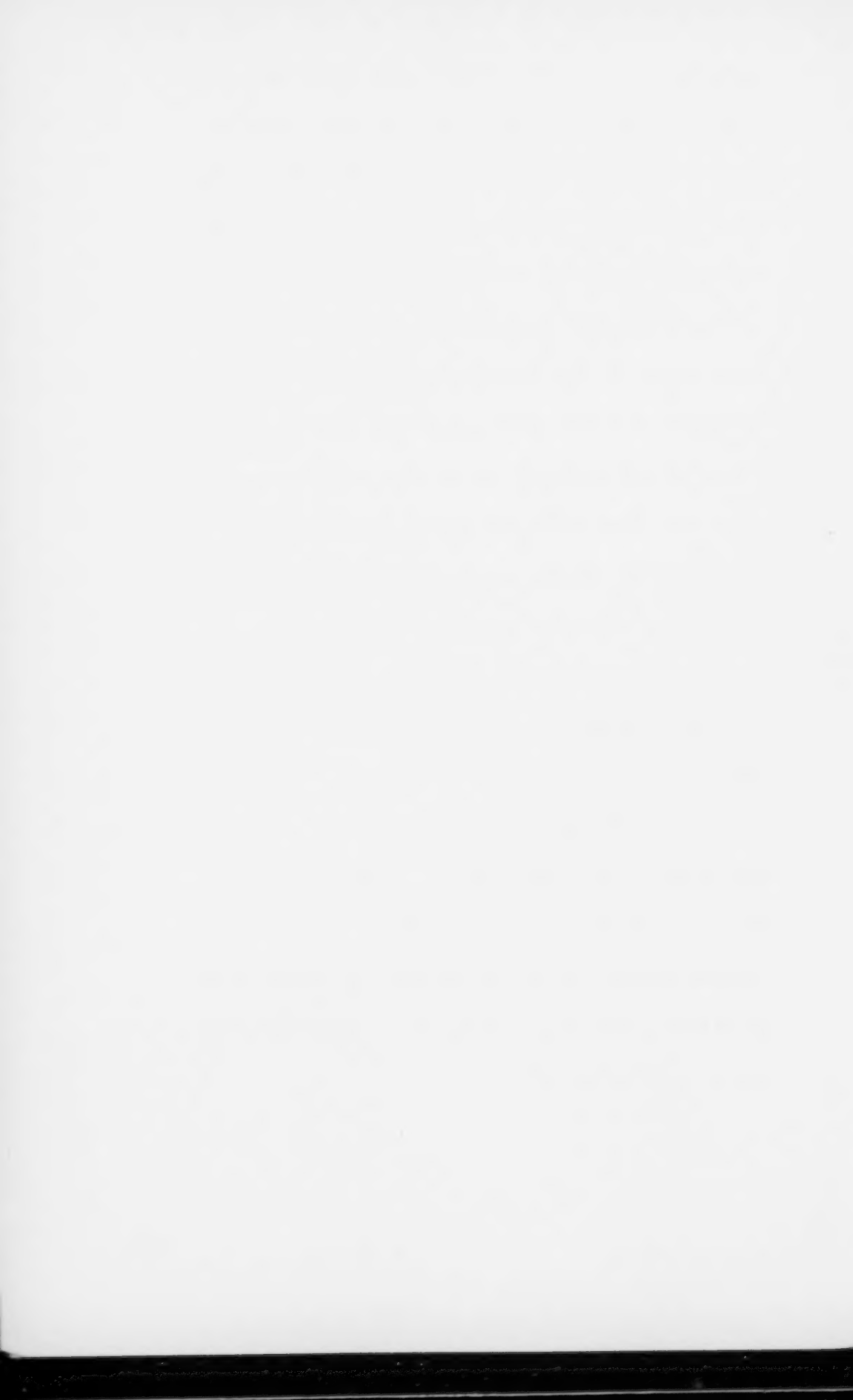


groups had both been canvassed to counter-demonstrate at the Gay Pride Parade but as yet remain undecided. Many of the demonstrators at the "Hail Mary" demonstration had come in buses from Rockland County. Captain Anemone, who had overall responsibility for supervising the demonstration, even testified that he recognized a few of his fellow parishioners. (Tr. 704.) Although Captain Anemone testified repeatedly that he considered the "Hail Mary" incident to be a violent situation, no injuries occurred and no arrests were made, nor did anyone request that arrests be made. (Tr. 687-88, 709-10.) Captain Anemone's own official report of the incident states merely that the demonstrators "harassed and verbally abused theatergoers." (PX 212.)

A total of only twelve police officers had been assigned to cover the "Hail Mary"



demonstration, (Tr. 648), and only wooden sawhorse barriers were used to designate the demonstration area. (See Tr. 688-89.) By 8:00 PM the "Hall Mary" protesters had grown to perhaps 5,000. Many of the later arrivals came in busses that unloaded on the open side of the Tully Hall. Of these late arriving counterdemonstrators, about one hundred refused to enter the demonstration pen that had been established by the police on the side street, and instead remained in the Alice Tully Plaza. This resulted in hostilities, comprised of jeers and shoving, between these counterdemonstrators and people entering the theater. Captain Anemone, however, did not call in for additional personnel until after 8:30 PM, when several protestors in the counterdemonstrator area moved aside the sawhorse barriers and also entered the plaza. (Tr. 683-90.)



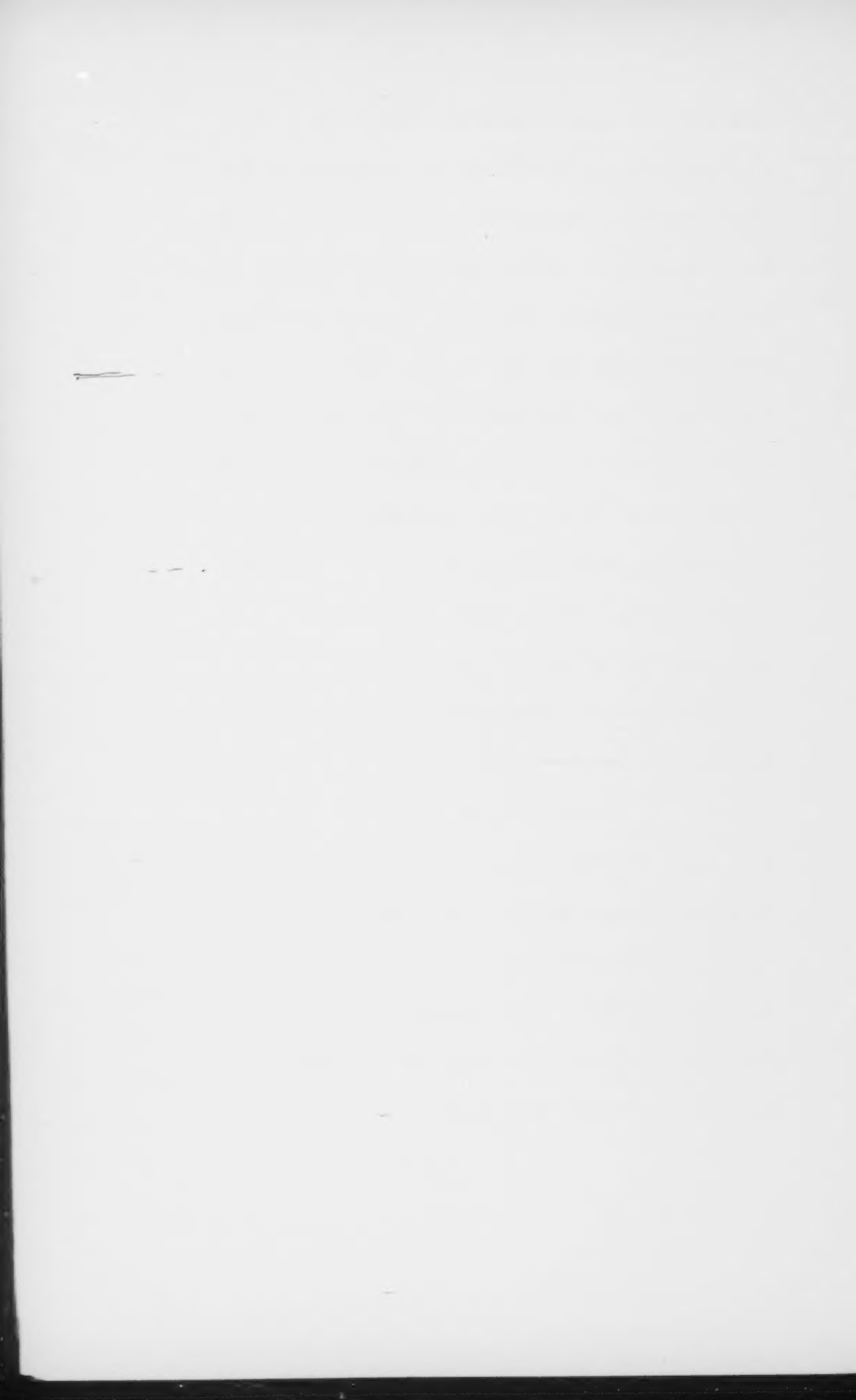
Before additional help arrived the police officers set up additional barriers, creating a passageway through which theatergoers could pass into the building in an orderly fashion and without interference by the protesters. Captain Anemone, who was present at the demonstration the entire time, testified that he believed there were reports of punching and shoving between theatergoers and demonstrators at this time. As noted above, however, they resulted in no arrests, injuries or property damage. (Tr. 691-94.) The tentativeness of Captain Anemone's testimony regarding violence during the "Hail Mary" demonstration, together with the lack of arrests or injuries, lead this court to conclude that police reports of violence are highly exaggerated.

When the additional twelve officers plus a sergeant arrived at Lincoln Center some time after the sawhorse passageway for



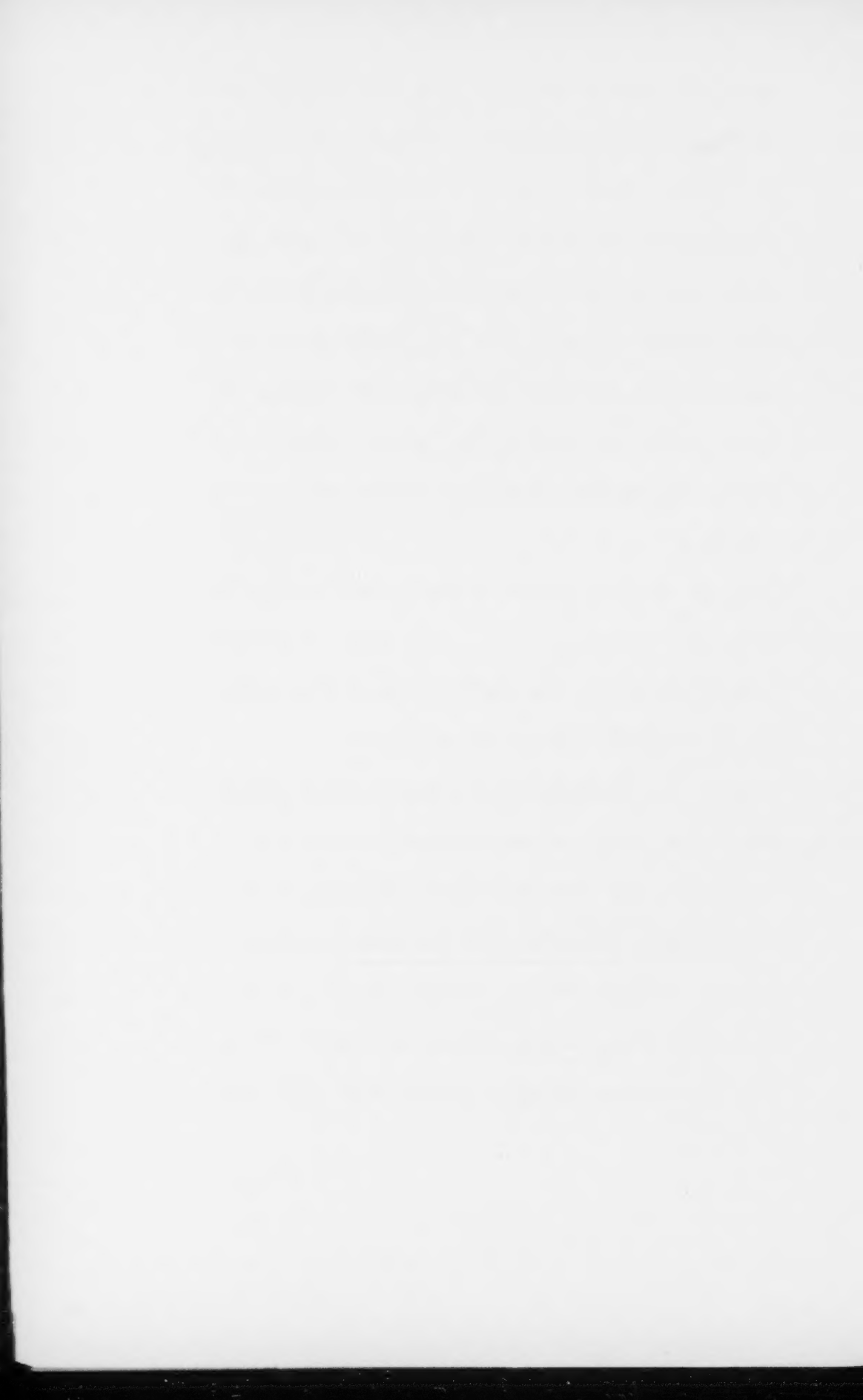
theatergoers was arranged, this made a total of twenty-five officers in all assigned to the "Hail Mary" demonstration. Judging from the controlled, albeit emotional, nature of the demonstration, this was clearly adequate police coverage for the crowd. Moreover, to the extent that the potential size and anger of the crowd had been underestimated and fewer police than was perhaps wise were originally assigned, Captain Anemone admitted he had been "imprudent" in assessing the situation. (Tr. 703.)

The court concludes that the other demonstrations described at trial as variously relevant to predictions of increased violence if Dignity is allowed to occupy the Cathedral sidewalk at this year's Gay Pride Parade, do not in fact contribute to the rationality of the restriction. For example, at public hearings held at City Hall earlier this year on the proposed Gay Rights Bill, pro and



anti-gay rights groups and individuals sat interspersed listening to testimony and rising to voice their views. Several hundred members of the public attended the hearings. Only one or two policemen were present in the council chamber during the meeting and security precautions at City Hall appear to have been unremarkable. No violence or other disruptive incidents occurred. (Tr. 620-24.)

At another event brought to the court's attention pro and anti-gay groups demonstrated at the Eighth Street Playhouse in Greenwich Village at a showing of gay films. The demonstrators were placed within sight and sound of each other by the police. Moreover, the anti-gay demonstrators at this event were members of the same Orthodox Jewish group whose people have already appeared at past Gay Pride Parades. Thus, the police are already acquainted with this



group's quite manageable potential for turnout and violence. In any event, no incidents of violence occurred at the Eighth Street Playhouse demonstration. (Tr. 419-20; Undisputed Facts # 117.)

In concluding that police assertions of a potential for violence at this year's Gay Pride Parade are neither reasonable nor credible, the court has also considered the evidence of police resources employed in past Gay Pride Parades or otherwise reasonably available. In light of this evidence the court finds that even if the larger number of counterdemonstrators generously predicted for this year's Parade do materialize, it is extremely unlikely that the police will be unable to maintain order.

The New York City Police Department contains approximately 26,000 officers and is the largest police department in the country. (Tr. 400; 747; PX 1, p. 390.) In the 1985

Parade the Police Department deployed 1,876 police officers, as compared to 4,198 at the St. Patrick's Day Parade. (PX 39; Tr. 414.) To cover the Gay Pride Parade from 59th Street to Greenwich Village, (about 53 blocks), the police department used approximately 1,400 officers. To cover only fifteen blocks of the St. Patrick's Day Parade route, however, the police, perceiving a necessity, were able to deploy 850 officers. (Tr. 415-16.) Notwithstanding this discrepancy and the St. Patrick's Day Parade's known history of rowdiness, (Tr. 415-420), Chief Kerins testified that he thought the Gay Pride Parade presented a much greater potential for violence than the St. Patrick's Parade. (Tr. 414.) The court concludes from this testimony that police estimates of the special potential for violence at the Gay Pride Parade area exaggerated and thus not entirely credible.

The court also notes various aspects of police equipment and expertise to support its conclusion that management of any potential hostility and violence at this year's Parade is well within police capacity. Some time prior to the 1985 Gay Pride Parade the New York City Police Department acquired "French barricades." These barricades are waist high metal barriers that lock together and have vertical metal slats to prevent people from climbing underneath them, as is possible with the traditional sawhorse barricades. (Undisputed Facts # 124; Tr. 391; PXs 187, 191, 193.) The police successfully used these barricades during the 1985 Gay Pride Parade to prevent any slippage of counterdemonstrators out of their assigned area on 50th Street. (See PXs 187, 191, 193.) While the police contend that one cannot rule out the possibility of a counterdemonstrator attempting to "climb



over two sets of barriers, fight with police officers who are in front of him, and get across the street [to attack Dignity demonstrators]" (Tr. 265), the court does not understand the exact legal significance of this possibility. Although it is not theoretically impossible that a counter-demonstrator would attempt to breach the triple set of barriers lining Fifth Avenue and manned with a row of police, (see PXs 187, 191, 193), it is indeed never possible to rule out every distant potential for violence in human affairs. (Tr. 400.) The mere theoretical possibility of violence cannot provide a basis for police restrictions on free speech.

Current police plans for the 1986 Gay Pride Parade belie defendants' assertions of belief that the atmosphere and counter-demonstration efforts surrounding this year's event differ in any significant way from



previous years. This year Chief Kerins intends to assign approximately 1,400 police officers to the entire Parade, including the rally which takes place at the Parade's terminus in Greenwich Village. (Tr. 389.) As in past years, he intends to deploy approximately one hundred police officers in the immediate Cathedral area. (Tr. 390.)

Finally, in evaluating police protestations that the presence of Dignity on the St. Patrick's Cathedral sidewalk might well create a situation where it would be impossible for the police adequately to ensure public safety, the court turns its attention to a police plan developed last year in response to its own decision requiring Dignity's access to the Cathedral sidewalk. The police plan, which was never fully revealed to this court, see supra p. 23-24, and which was of course never put into



effect because of the Second Circuit reversal of the preliminary decision in plaintiffs' favor, provided for the presence of about fifty to one hundred Dignity members on the sidewalk fronting St. Patrick's for the duration of the Gay Pride Parade. (Tr. 94-95, 396-99; PX 129.) A formation area for Dignity members who had been selected to demonstrate on the Cathedral sidewalk would have guarded against the group's infiltration by counterdemonstrators. Police officials were not concerned about possible counterdemonstrator infiltration were this plan effectuated. (Tr. 411; 244.) This plan to allow Dignity on the sidewalk included the assignment of 50 additional police officers to the Cathedral area, and kept another 50 in reserve nearby. No mounted police detail was added, however. (Tr. 243-44.)

Prior to the Court of Appeals' reversal of the decision granting Dignity access to the Cathedral sidewalk, Chief Kerins informed Msgr. Rigney of St. Patrick's that he would have sufficient police to ensure public safety. (PX 129; Tr. 94.) Yet when confronted at trial with the fact that they had managed to devise a plan to comply with the court's order last year, police testified awkwardly that they believed the plan inadequate to ensure public safety. (Tr. 266-67.) However, Lt. Congelosi, who so testified, had never requested the inclusion of additional police in the special plan. (Tr. 272.) Chief Kerins, who testified to his belief that the number of additional police officers included in the plan was sufficient if only to effectuate this court's order, also rather contradictorily said he did not believe the one hundred additional officers would have been adequate to maintain public order.

(Tr. 499-500.) When asked to explain this peculiarity, Kerins told the court simply, "The closer you get to the flame the more sure that somebody is going to get burned, and we prefer not to have them [Dignity] on the sidewalk for that reason."

Considering the evidence of police manpower, the court finds that if Kerins had truly believed the plan to be inadequate he would have assigned additional officers (See Tr. 501.) Moreover, when compared to the designation of only ten mounted policemen to 47th Street in 1985 in response to the announced intention of the Orthodox Jewish counterdemonstrators to blockade the entire Parade, (Tr. 392-3) the court finds it impossible to credit police suggestions that short of calling out the National Guard, no number of police officers would have been adequate to check the potential for violence

had Dignity been allowed to demonstrate on the sidewalk of St. Patrick's. (Tr. 499.)

The significance of the more fully developed record on this trial to the Second Circuit decision in this case handed down last year, must be underscored. The Circuit panel concluded that in light of various factors supporting police contentions that a substantially greater potential for violence would exist should Dignity's request be granted, the district court's decision finding plaintiffs to have demonstrated a likelihood of success on the merits was clearly erroneous. The "strong unrefuted evidence," listed by the Circuit Court that the stated potential for violence was not merely speculative, Olivieri v. Ward, 766 F.2d at 692-93, has been severely undermined during this trial. Upon closer examination of the factual background of this case, among other factors listed by the

Circuit Court last year, the 1983 counter-demonstrators, the opposition of the Catholic War Veterans and the Knights of Columbus, past recruitment mailings by the Committee for the Defense of St. Patrick's, and the public positions of the Catholic Church, are inadequate to support the credibility and rationality of stated police fears for the 1986 parade should Dignity be allowed on the sidewalk.

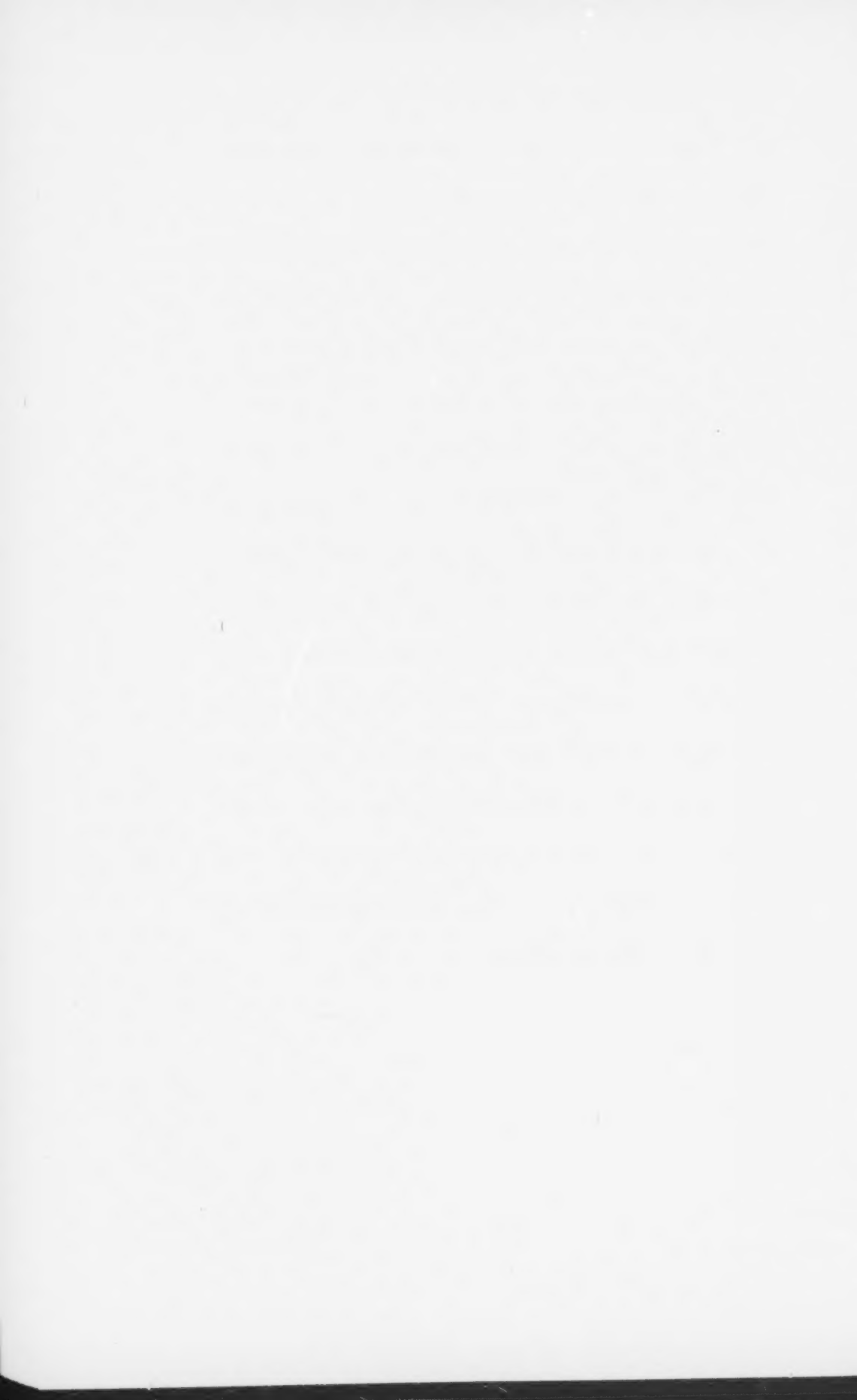
This trial has also revealed the inaccuracy of the statement that counter-demonstrator groups "overran" police barricades during past Parades, and of the belief that Dignity had previously demonstrated at the Cathedral outside the context of the Parade. Finally, the court notes a significant inaccuracy in the facts as originally considered by the Court of Appeals with regard to the placement of Dignity and the counterdemonstrators during



the Gay Pride Parade in 1985. Instead of being assigned to areas adjacent to the Cathedral, id. at 691, the counter-demonstrators and the demonstrators were assigned to West 50th Street and West 51st Street respectively, areas that are diagonally across the street a significant distance from the Cathedral sidewalk where Dignity wishes to demonstrate.

Upon careful evaluation of the voluminous evidence in this case the court concludes that police predictions of a significant potential for violence from counterdemonstrators at the 1986 Gay Pride Parade are incredible. Even were the court untroubled by the credibility of police assertions, however, it would find their predictions irrational in view of the negligible support that has been offered for them. The court also finds that any potential for violence at the 1986 Parade will

not be significantly affected by the presence of Dignity on the Cathedral sidewalk. Rather, the court concludes that in light of the absence of any heightened potential for violence caused by Dignity's presence on the sidewalk, a more convincing explanation for the police decision to deny Dignity's request is discomfort with the content of Dignity's message. Police sensitivity to the discomfort of counterdemonstrators and the Catholic Church, as well perhaps, as discomfort within the Police Department, itself, with Dignity's message, are more credible explanations for the challenged restriction than any serious concern on the part of the police with an increased potential for violence rising from the mere presence of Dignity on the sidewalk.



CONCLUSIONS OF LAW

The Fifth Avenue sidewalk in front of St. Patrick's Cathedral to which plaintiffs in this case seek access is a classic public forum for the exercise of First Amendment rights. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). This sidewalk lies in the heart of a great and pluralistic city that has long flourished as one of the nation's most fertile seedbeds for new and often disturbing ideas. New York City and the police who serve it are exceedingly familiar with controversy and dissension and the often emotional public expression they inspire. The police must daily labor to safeguard the precious First Amendment values of this country while maintaining order and civility against the constantly charged backdrop of this city.

The right to free expression in this society, however, is not unlimited, for good sense and practicality dictate that certain reasonable time, place, and manner restraints be imposed on occasion in the interest of the smooth and safe functioning of daily life. Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); International Society for Krishna Consciousness, Inc. v. City of New York, 484 F. Supp. 966 (S.D.N.Y. 1979) (Motley, J.) (upholding as valid time, place and manner restraint police decision to bar plaintiffs' solicitation and proselytizing activities at visitors' gate at the United Nations headquarters, due to well-founded state interest in maintaining traffic flow and protecting safety of U.N. visitors, and by state's legitimate concern with terrorism.) Defendants in this case explain that the restriction on plaintiffs' First Amendment

rights here challenged is merely one such reasonable time, place and manner restraint. The relatively straightforward question thus presented by this lawsuit is whether defendants' decision to bar Dignity from its chosen forum in front of St. Patrick's Cathedral can withstand this court's scrutiny and be sustained as a valid time, place and manner restraint on free speech.

Clearly, where fundamental constitutional rights are at stake, a court must not stand back and meekly bow to the protestations of rationality so routinely offered by public officials and agencies. City of Los Angeles v. Preferred Communications, Inc., ____ U.S. ____, ____, 106 S Ct. 2034, 2038, 90 L.Ed. 2d 480 (1986). Especially in the context of First Amendment challenges to restraints on the expression of views that are unpopular and, to many, even repulsive, the court

must proceed warily. "[T]he excuses offered for refusing to permit the fullest scope of free speech are often disguised, [and] the court must carefully sort through [them] to see if they are genuine." Olivieri v. Ward, 766 F.2d 690, 691 (2d Cir. 1985). Similarly, where First Amendment values have been balanced with other social concerns, the court "may not simply assume that the [restriction] will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity." City of Los Angeles v. Preferred Communications, Inc., supra, ____ U.S. at ____, 106 S. Ct. at 2038 (quoting Taxpayers for Vincent, 466 U.S. 789, 803 n. 22, 104 S.Ct. 2118, 2128 n. 22, 80 L.Ed. 2d 772 (1984)).

The standard for assessing the validity of any time, place and manner restriction on the free expression of speech is

well-established.³ The restriction must satisfy three requirements. It must be content-neutral, it must be narrowly tailored

³ This standard is similar, though not identical, to the standard applied in reviewing government restrictions on constitutionally protected expressive conduct. Such symbolic expression may be forbidden or regulated if the conduct itself may be constitutionally regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984) (governmental interest in clean parks sufficient to justify prohibition of "expressive" overnight camping.) Traditionally, government restrictions on expressive conduct have been upheld where in its more familiar non-expressive context, the conduct has previously been subject to regulation for obvious pragmatic purposes. See Clark, *supra* (overnight camping); United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (destruction of draft registration cards), and where the regulation condemns only the independent noncommunicative impact of the expressive conduct. United States v. O'Brien, *supra*, at 385, 88 S.Ct. at 1683. The present case clearly does not fall into the jurisprudence of expressive conduct.

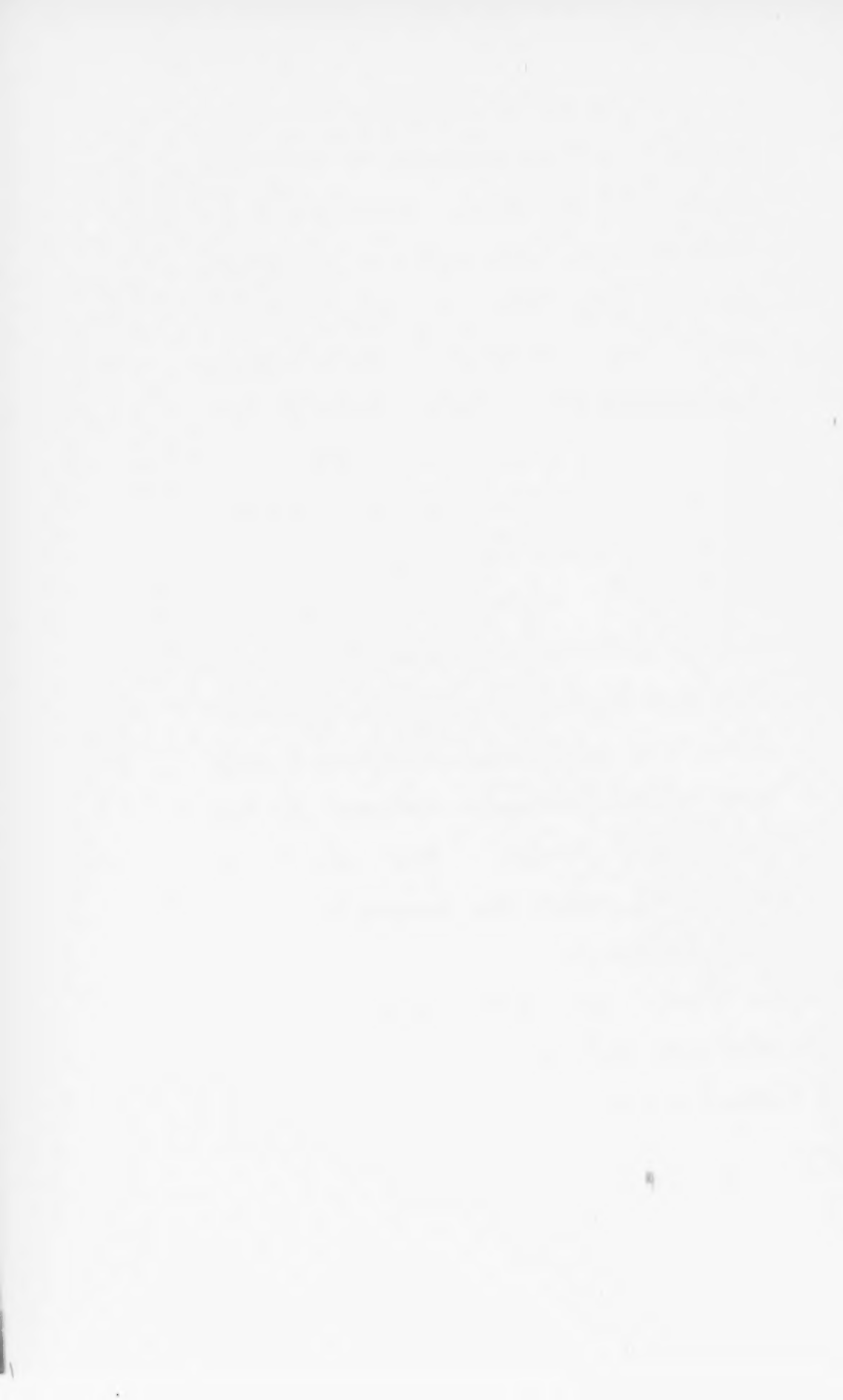
to further a significant government interest, and it must leave open ample alternative channels for communication. Clark v. Community for Creative Non- Violence, 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984).

A constitutional challenge to the validity of a state-imposed time, place and manner restraint on free speech can, in most cases, only find proper resolution after a full development of the underlying factual disputes involved. See City of Los Angeles v. Preferred Communications, Inc., supra ____ U.S. at ____, 106 S. Ct. at 2038. Accordingly, in this case brimming with factual controversy about the proper inferences to be drawn from essentially undisputed facts, the court has arrived at its constitutional determination only after a full trial. The court has brought to this trial and its evaluation of the evidence there

presented its special experience and skill in making factual determinations on such vexed issues of motivation, credibility, and reasonableness. See Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); Pullman-standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L. Ed.2d 66 (1982).

The court concludes that plaintiffs must prevail in their challenge to the police restriction of their use of the sidewalk fronting St. Patrick's Cathedral during the 1986 Gay Pride Parade. The restriction cannot pass constitutional muster as a valid time, place and manner restraint for two independent reasons. Each would be adequate to defeat the constitutionality of the restriction.

First, the court finds that the restriction must fail because it is not content-neutral. The matter and not the



manner of plaintiffs' message is precisely the reason for its restriction. Defendants have denied Dignity's request to demonstrate in front of St. Patrick's this year directly in response to the complaints of citizens opposed to Dignity's message. The present situation thus presents the effective use of a "heckler's veto," a device which by its nature is content-sensitive and which has been consistently rejected by the courts as an invalid basis for restricting the exercise of free speech in a traditional public forum. See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 615-16, 91 S.Ct. 1686, 1689, 29 L.Ed. 2d 214 (1971); Terminiello v. City of Chicago, 377 U.S. 17, 69 S.Ct., 894, 93 L.Ed. 1131 (1949). That the veto here has not succeeded in completely silencing plaintiffs' message, but only in restricting its expression, does not change its fundamental nature as a heckler's veto

repugnant to long-standing constitutional values. See Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972).

Defendants have argued that by freezing the sidewalk in front of St. Patrick's to all demonstrators the restriction is perforce content-neutral. Indeed, they argue, allowing plaintiffs to use the sidewalk while denying its use to anti-gay counter-demonstrators would defeat the content neutrality of the police decision because it would amount to a preference for plaintiffs. The court rejects this argument. For one thing, it is logically and constitutionally infirm to conclude that whenever competing groups both wish to use a single forum, the First Amendment or its requirement of content neutrality demand that all speech be barred from that forum entirely. See Olivieri v. Ward, 766 F.2d at 696-97 (Kearse, J. dissenting). Content-neutral

criteria for granting access to the more desirable and sought after of public fora have long been employed by public officials and upheld by the courts. See Gay Veterans Association, Inc. v. The American Legion, 621 F.Supp. 1510 (S.D.N.Y. 1985), (Motley, Ch. J.) (parade route validly assigned to its historical holder despite plaintiffs' application for same route during same time; plaintiffs' request to enjoin American Legion Parade denied) (aff'd by the Second Circuit orally from the bench November 8, 1985 without written decision).

More damaging to defendants' argument that evenhandedness to both groups requires the complete freeze of the sidewalk is the factual infirmity of the argument. The counterdemonstrators by their own and by police department testimony are not themselves truly interested in demonstrating on the sidewalk in front of St. Patrick's.

Instead, their goal is simply to keep Dignity and other gay demonstrators off the sidewalk.

Defendants have also sought to defend the content neutrality of the restriction at issue here by claiming that although it may appear content-sensitive, the restriction is sensitive merely to the secondary effects of plaintiff's expression, i.e., the increased potential for violence to which it would give rise. In City of Renton v. Playtime Theatres, Inc., ____ U.S. ____, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986), a suit placing into question the content neutrality of an ordinance barring adult movie theaters from certain parts of town, the Supreme Court explored a situation where a seemingly content sensitive time, place and manner restriction was able to pass the test of content neutrality. The Court found that the "predominate" intent of the ordinance

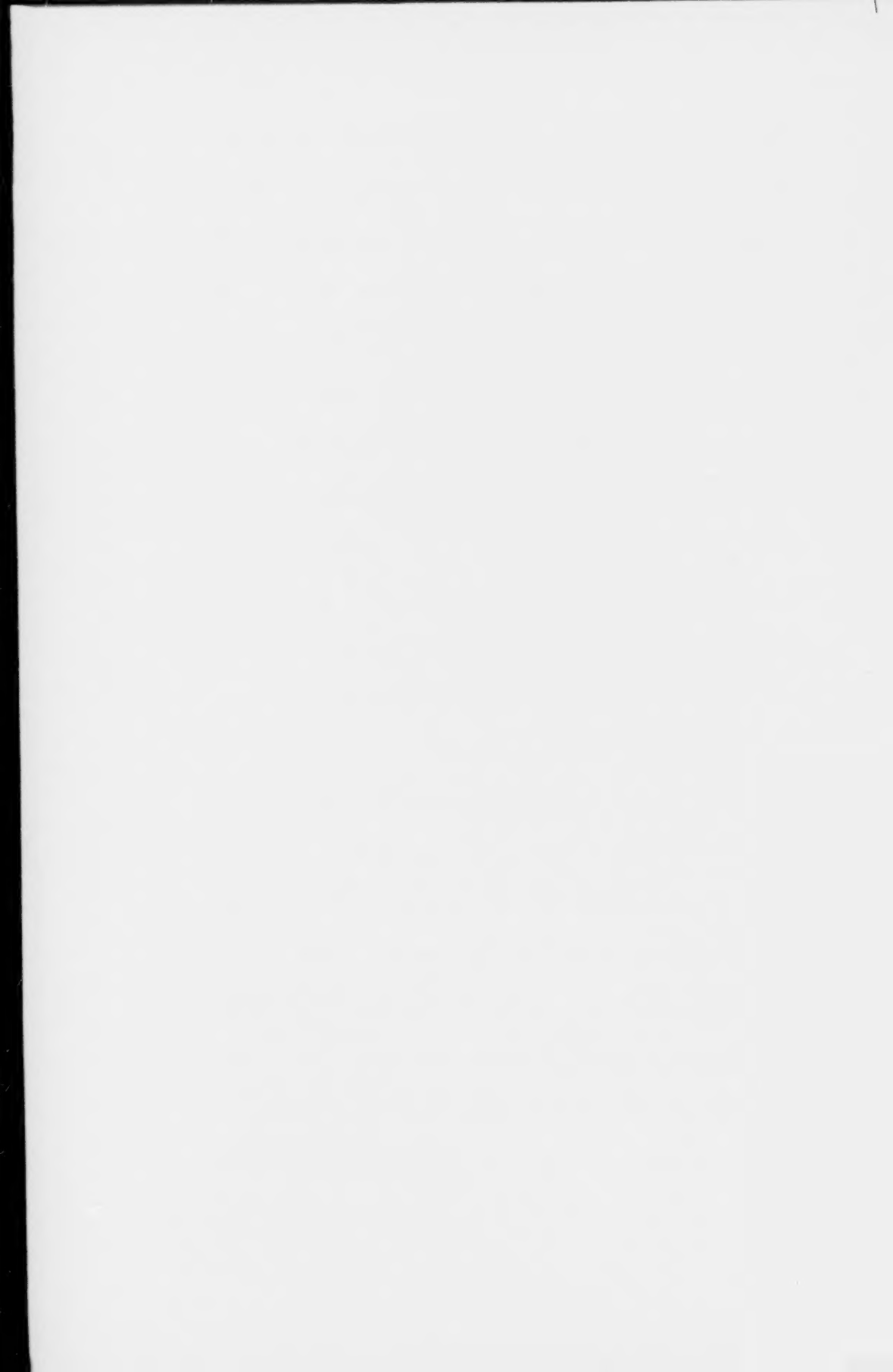
was aimed at the secondary effects of this kind of theater, i.e., the effects it would have on a neighborhood, for example, as determined by the district court, the lowering of property values, the encouragement of crime, and damage to the city's retail trade. This was adequate, said the Court, to establish that the regulation was unrelated to the suppression of free speech. Where a restriction on free expression is designed to promote traditional state interests in safety and welfare, and is thus "justified without reference to the content of the regulated speech," City of Renton, supra, ____ U.S. ____, ____, 106 S. Ct. 925, 929, 89 L.Ed.2d 29, 38 (citing Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976) and adding emphasis), the court concluded, it will "not contravene the fundamental

principle that underlies [the] concern about 'content-based' speech regulations [i.e., that they will be content based]....." City of Renton, supra, ____ U.S. ____, ____, 106 S.Ct. 925, 929, 89 L.Ed.2d 29, 38.

The court rejects defendants' claim that the restriction on Dignity at issue in this case is grounded not in its content but instead in its purported secondary effect, i.e., the violent counterdemonstrator reaction that Dignity's presence on the sidewalk might provoke. The reason for the court's rejection of this "secondary effect" rationale is simply that it does not find that the presence of Dignity on the sidewalk gives rise to any particular secondary effect that might justify the restriction. The court has stated its factual conclusion that police estimations of the special potential for violence in this year's Gay Pride Parade, and particularly from Dignity's presence on

the Cathedral sidewalk, are neither credible nor rational. The mere allegation that Dignity's presence on the sidewalk will produce a particular secondary effect is obviously insufficient to clear the restriction from the taint of content sensitivity. Moreover, no other reason has been offered, such as a time-conflict with scheduled events in the Cathedral, or the simultaneous application of several groups for the same spot, to justify the restriction here imposed.

In arriving at its conclusion that the exclusion of Dignity from the Cathedral sidewalk is not content-neutral, the court relies on more than its perception of the pretextual nature of the police assertions of an increased risk of violence. This total absence of any credible reason for the restriction might well suffice for an inferential conclusion that the restriction is not content-neutral as alleged. In the



present case, however, the pretextual nature of the justification stands alongside the existence of a heckler's veto as well as the presence of a certain excessive sensitivity to the Catholic Church on the part of police officials, to support the court's assessment that the restriction here is not content neutral.

The historical evidence of police sympathy with the Church is evidenced in particular by the secret meeting with Church officials in 1983 and the peculiar language of the memo it spawned which, indeed, reads as if the police were responding to a Church request and planned to offer post facto public safety rationales to the world at large. Also extremely unsettling is the evidence of police communications with the Cathedral in 1984 proposing that church services be scheduled during the Parade to help the police reimpose the sidewalk freeze

that year. While standing alone this evidence of historical police complicity with the Church might be inadequate to support a finding that the 1986 restriction is not content-neutral, the cumulative evidence, both affirmative and negative, of content sensitivity in this case clearly supports such a conclusion.

The court finds separate and independent grounds for striking the restriction in question here in the second prong of the time, place and manner inquiry into the constitutionality of the police decision. The restriction imposed on Dignity is not adequately tailored to further a significant governmental interest. While there can be little question that the maintenance of public order and the prevention of street violence are in themselves significant governmental interests, see Concerned Jewish Youth v.



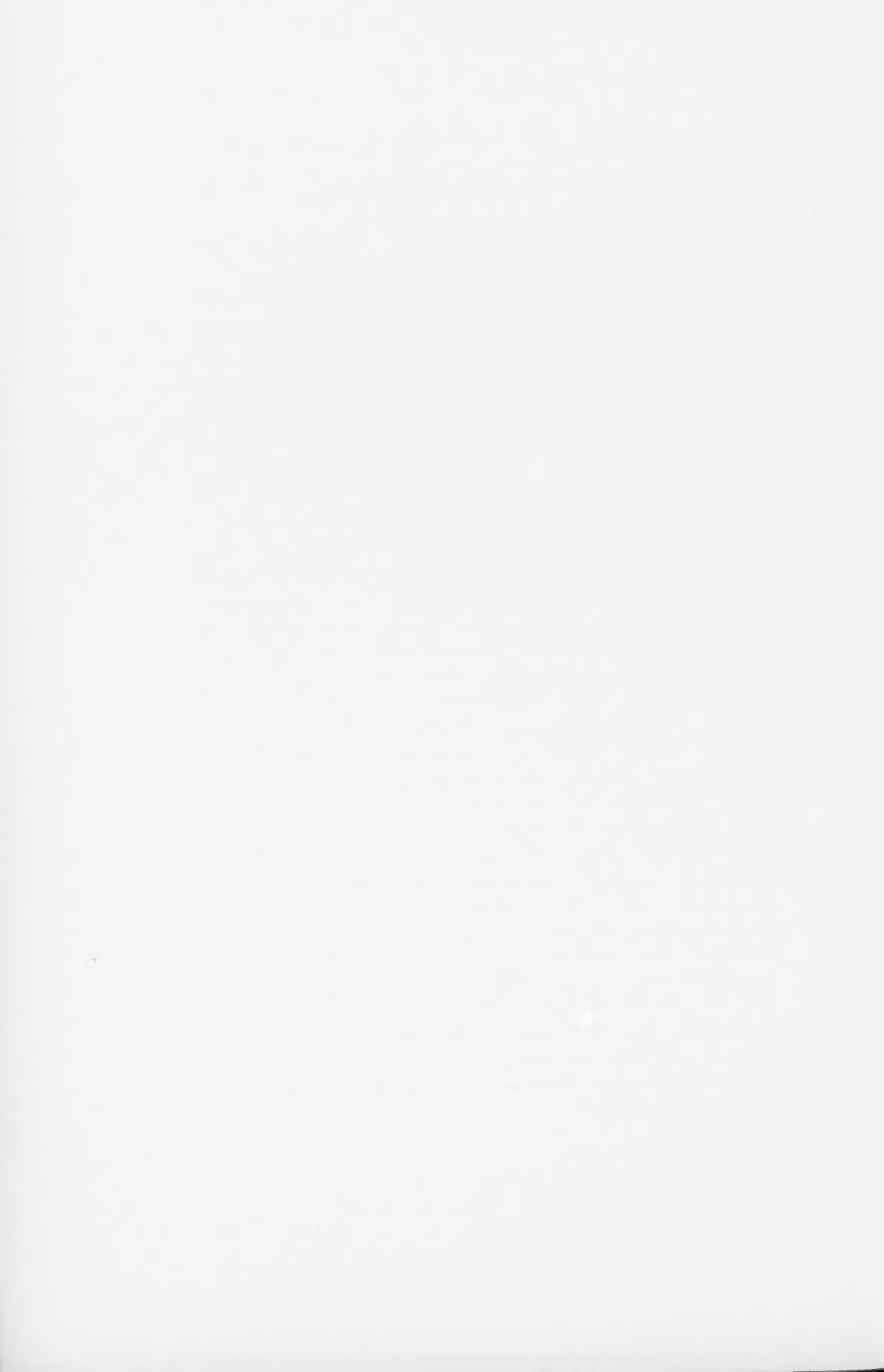
McGuire, 621 F.2d 471, 474 (2d Cir. 1980), there has been little convincing evidence in this case that these interests would in any way be threatened by Dignity's presence on the sidewalk, or conversely, promoted by its absence. Thus, there is a real question whether the restriction at issue here is rationally related to the furtherance of a significant governmental interest, much less narrowly tailored to its promotion.

Aside from the general lack of credible evidence that Dignity's absence from the sidewalk would in any way promote the government's interest in peaceableness, two aspects of the evidence particularly underscore the lack of rational relation between the challenged measure and public safety. The first is the court's finding that the only credible potential provocation for violence by counterdemonstrators during the Gay Pride Parade lies not in Dignity but in



the more dramatic and anti-Catholic expressions of the other gay demonstrators.⁴ These, and the counterdemonstrator outrage at the Parade generally, are something with which the police must deal in any event and do not appear to this court to be substantially affected by whether or not

⁴ That the potential for violence by provocative acts of certain of the most extreme gay demonstrators is somewhat credible, and thus that their placement on the sidewalk could be unwise, in no way leads to the conclusion that the drastic step of freezing the sidewalk to all must be taken. There is no evidence that any of these other gay groups have specifically requested access to the sidewalk this year. The question of whether a prohibition from the Cathedral sidewalk of the Man-Boy Love Association or of blasphemous costumed figures would constitute a valid restraint because of the true risk that such expressions might in fact create is not now before the court and thus need not be considered. The only question now before the court is whether there is in fact a real potential for extreme violence from Dignity's access to the sidewalk such that the police restriction constitutes a valid time, place and manner restraint.



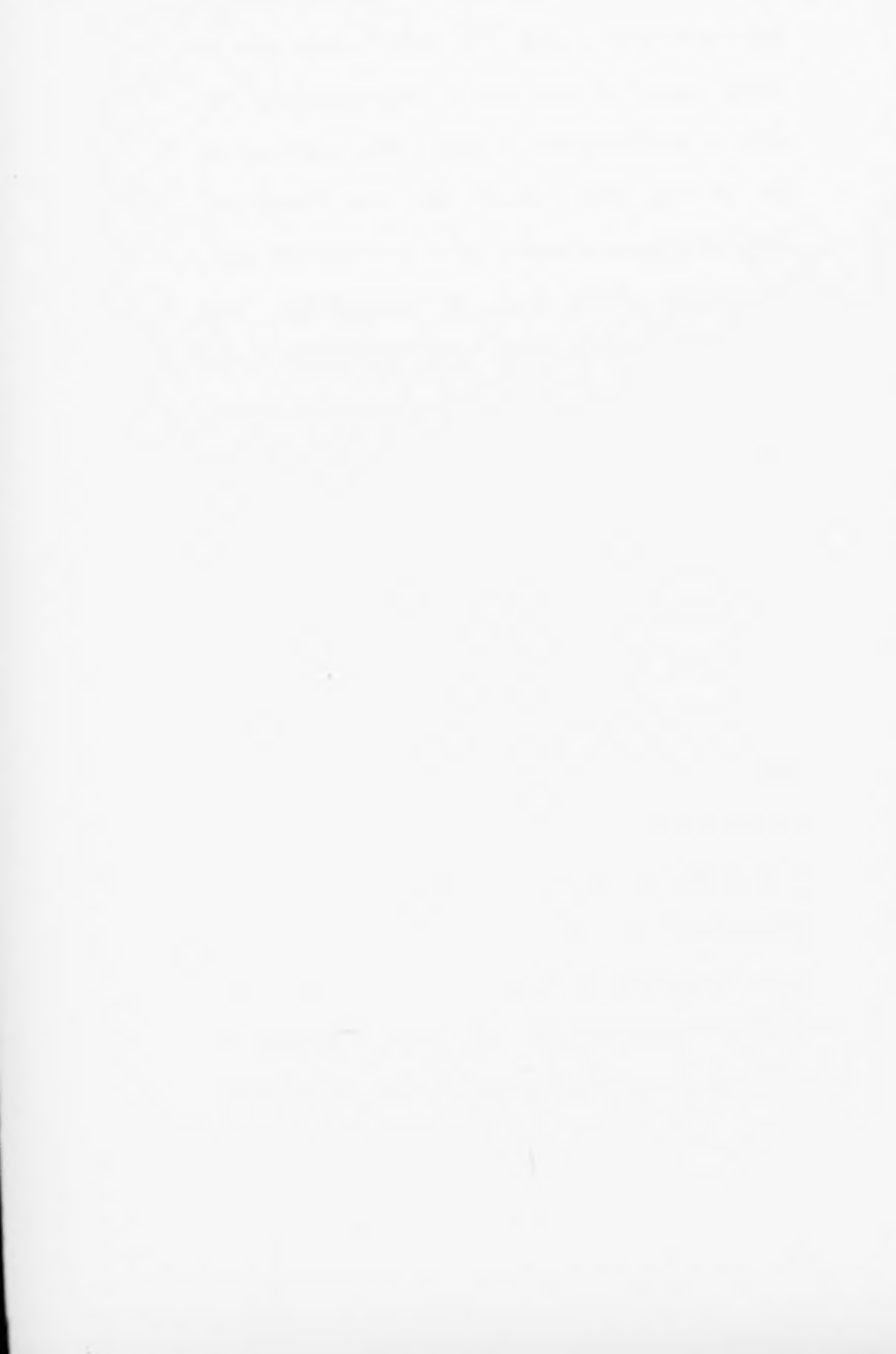
Dignity is allowed to demonstrate on the sidewalk.

The second salient indication of the irrationality of the decision to keep Dignity off the sidewalk derives from a comparison of this request with the Parade-stopping street ceremony that Dignity is now allowed. In the court's judgment, the street ceremony provides a provocation fairly equivalent to the one that Dignity's limited access to the Cathedral sidewalk would create. Not only is the fifteen minute street ceremony a more dramatic event, because more focused than a Parade-long demonstration by Dignity on the sidewalk would probably be, it is also located significantly closer to the counter-demonstrators than Dignity's requested sidewalk location on the east side of Fifth Avenue in front of the Cathedral. Standing in the avenue and spanning the Cathedral block, as the Dignity group now does during



this ceremony, (see PX 195), they are in better sight of the counterdemonstrators, as well as within easier access, than they would be across the street on the Cathedral sidewalk demonstrating in a barricaded pen. Thus the court fails to understand how keeping Dignity from the sidewalk, and instead allowing them their Parade-stopping Fifth Avenue ceremony, is rationally related to the furtherance of any significant public interest.

Even putting aside its doubts as to the rationality of the police decision to bar Dignity from the sidewalk, however, the court finds that the restriction on Dignity is not narrowly tailored to promote the interest it is designed to serve. While the legitimate government interest in public order is in no way contested, it must be understood that where the threat to the implicated government interest is minor, the severity of



the allowable restriction must also be lesser. Here, where the court has found that the threat to public order inherent in Dignity's provocative existence and speech is minimal, the justifiable restriction is also minimal. The mere speculative possibility of violence - present in even the most innocuous of public demonstrations - is surely not a sufficient affront to the government interests involved to justify unexamined abridgments of free speech. If this were the case there would be a good argument for barring political rallies from populated areas altogether and suggesting instead that protestors take out an ad in The New York Times.

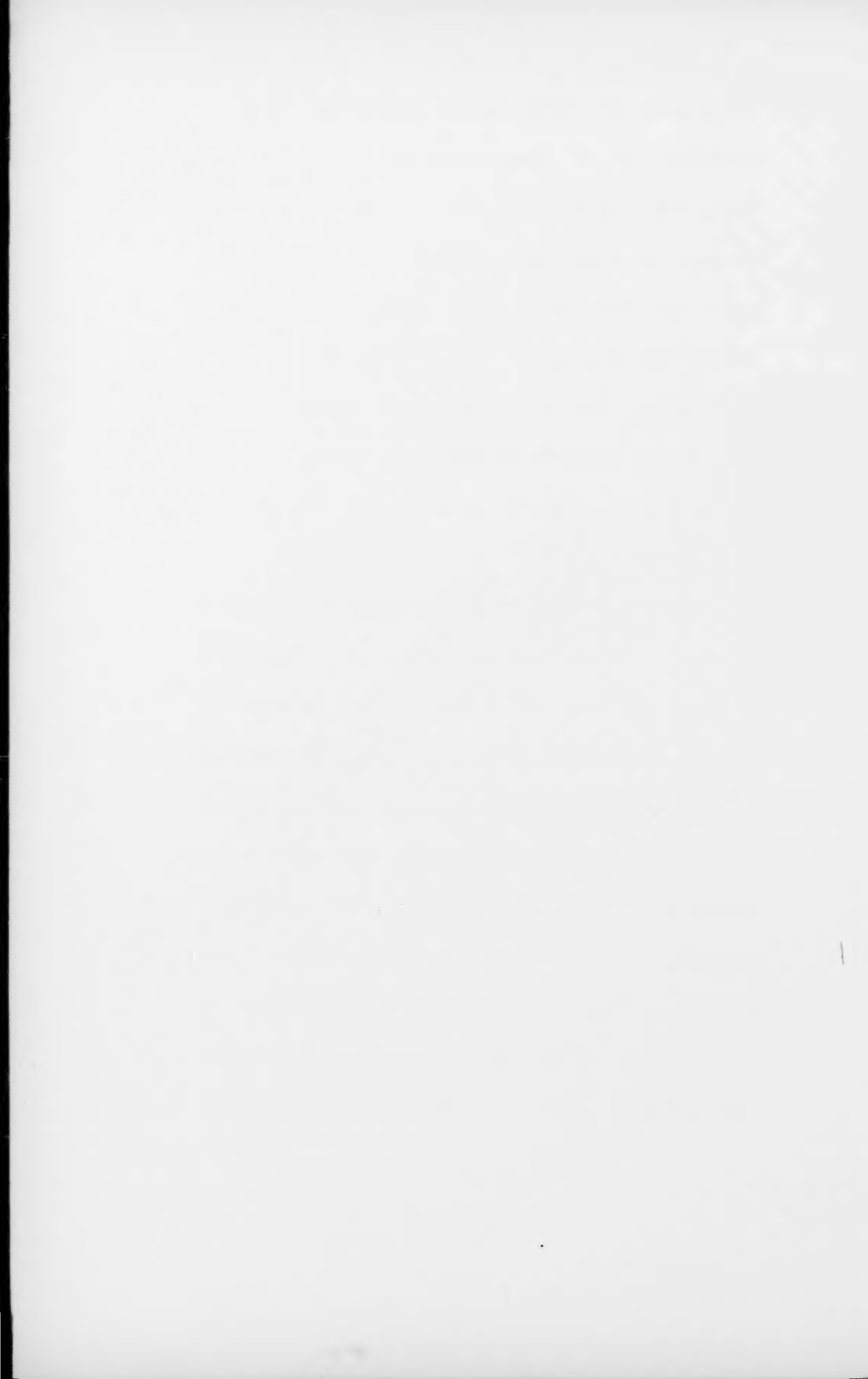
Moreover, to the extent that the threats to public order at the Gay Pride Parade concededly find their immediate source in the counterdemonstrators, it is of course they, and not Dignity, who should most logically be targeted for restraint.



The court finds that a decision to prevent completely Dignity's access to the Cathedral sidewalk is too severe in relation to the government interest to be served. In light of the more marked counterdemonstrator annoyance with the presence of demonstrating gays on the very steps of the Cathedral, a decision to keep Dignity off the Cathedral steps might conceivably be justifiable, notwithstanding the property owner's failure to demand such action. The court finds, however, that a plan which would allow Dignity limited access to the Cathedral sidewalk for the duration of the Parade, represents the correct constitutional measure of tailoring on Dignity's expression, in light of the governmental interest in maintaining order during the Parade that is implicated here. The police plan formulated in response to this court's order last May 1985, that would have provided for the

placement of fifty to a hundred Dignity members in a demonstration pen on the Cathedral sidewalk, is a more precise example of what the court has in mind. The court is confident that such a plan will adequately guarantee the government interest in peace, for it does not credit police department assertions that the police created an inadequate plan in response to the court's 1985 order.

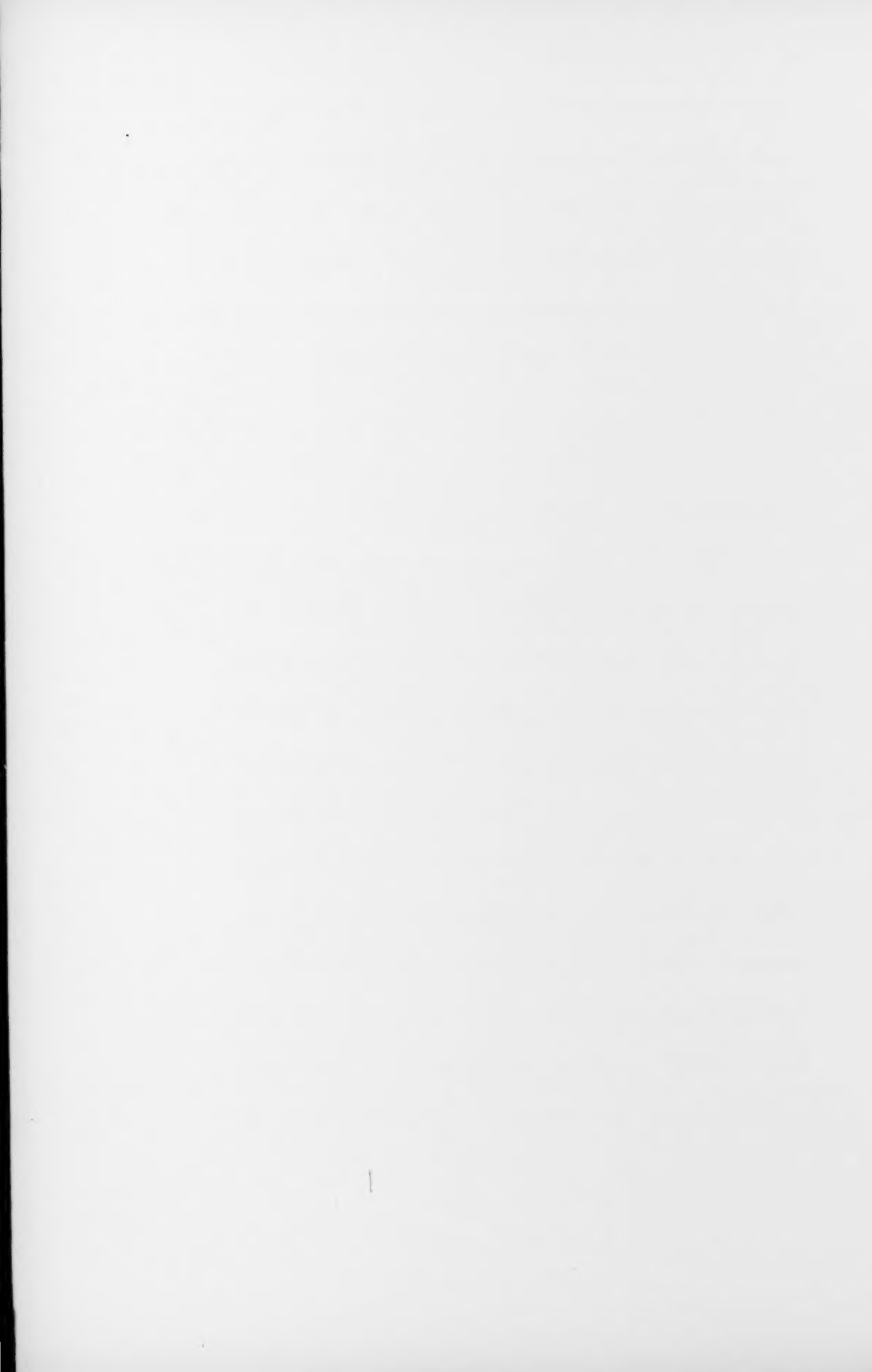
Having found that defendants' decision to bar Dignity from the St. Patrick's sidewalk during the Gay Pride Parade is neither content-neutral nor narrowly tailored to promote the public interest implicated, it is unnecessary to decide whether the sidewalk freeze allows Dignity adequate alternatives for the expression of its message. The court expresses no opinion in this regard. Furthermore, having found the restriction here challenged to be



constitutionally infirm as a valid time, place and manner restraint on two independent grounds, the court need not address plaintiffs' contentions that the restriction violates the Establishment Clause of the First Amendment or the New York State Constitution.

Attorney Fees

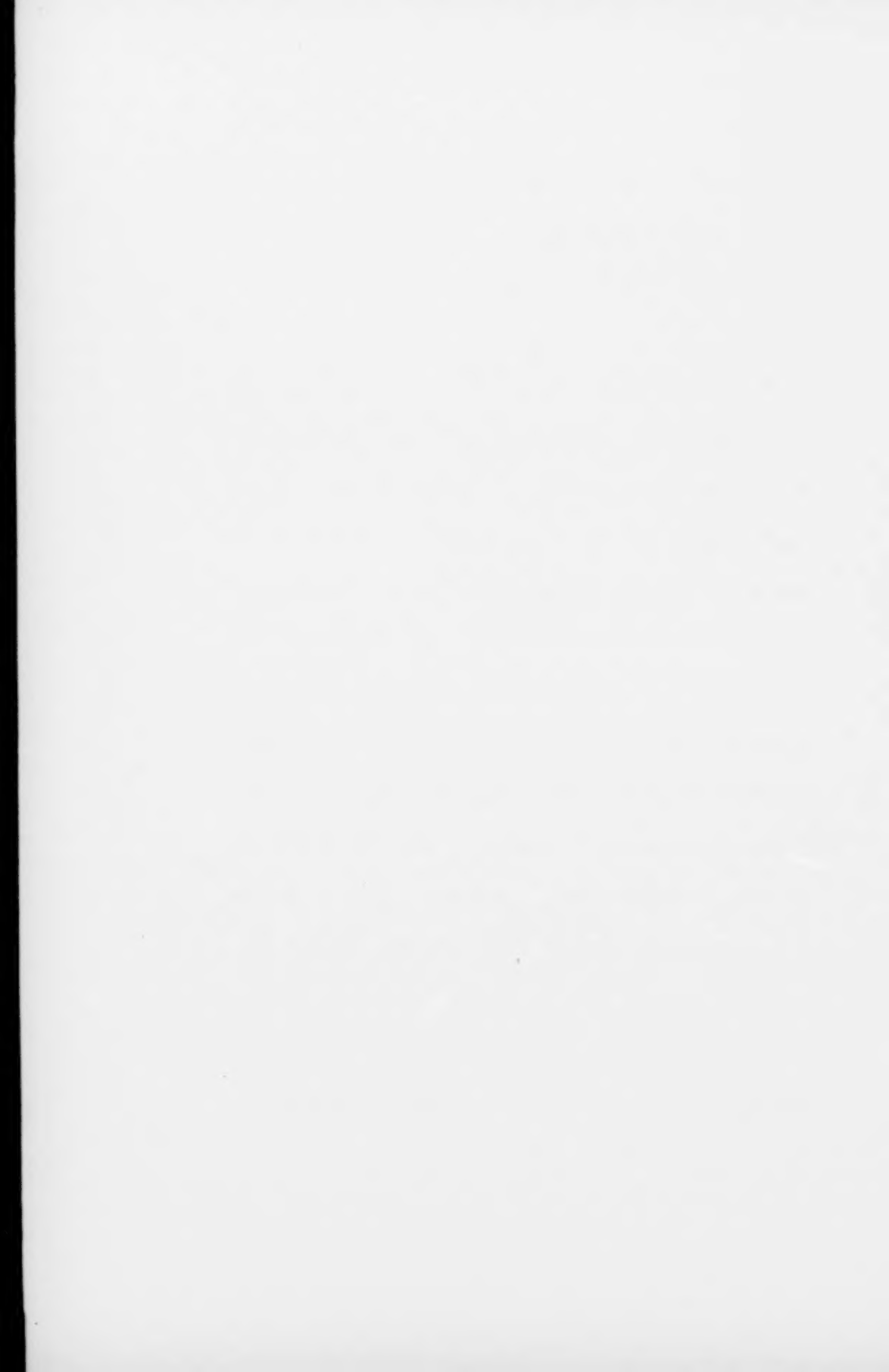
Plaintiffs have requested attorney fees under 42 U.S.C. Section 1988. 42 U.S.C. Section 1988 does not specifically provide for attorney fees to prevailing parties in claims under the federal constitution generally. Plaintiffs have not specifically alleged a violation of 42 U.S.C. Section 1983. Section 1988 is thus not available to plaintiffs to support their request for attorney fees. Because the court knows of no other statute that would serve as explicit statutory authority for an award of attorney fees in



this case, nor have plaintiffs offered any such authority, the request for attorney fees is denied. See Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

CONCLUSION

Plaintiffs' request for a permanent injunction enjoining defendants from preventing up to one hundred members of plaintiff Dignity-New York from holding a peaceful demonstration on the sidewalk in front of St. Patrick's Cathedral on Fifth Avenue between Fiftieth and Fifty-First Streets in New York City during the "Gay Pride Parade" on Sunday, June 29, 1986 or during subsequent annual Gay Pride Parades, for the duration of the Parade in the Cathedral area, is hereby granted. The court declares that defendants' decision to prohibit Dignity access to the sidewalk of



St. Patrick's Cathedral during the Gay Pride Parade of 1986 is an unconstitutional restraint on plaintiffs' First Amendment free speech rights.

Plaintiffs' request for an award of attorney fees is denied.

86-989

No. 86-

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DEC 15 1986

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JOSEPH F. SPANIOLO, JR.

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

- v. -

MICHAEL J. OLIVIERI, et al.,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
TWO VOLUMES
VOL. II, PP. 163-234

FREDERICK A. O. SCHWARZ, JR.,
Corporation Counsel of the
City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4581 or 4338

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

*Counsel of Record

December 12, 1986

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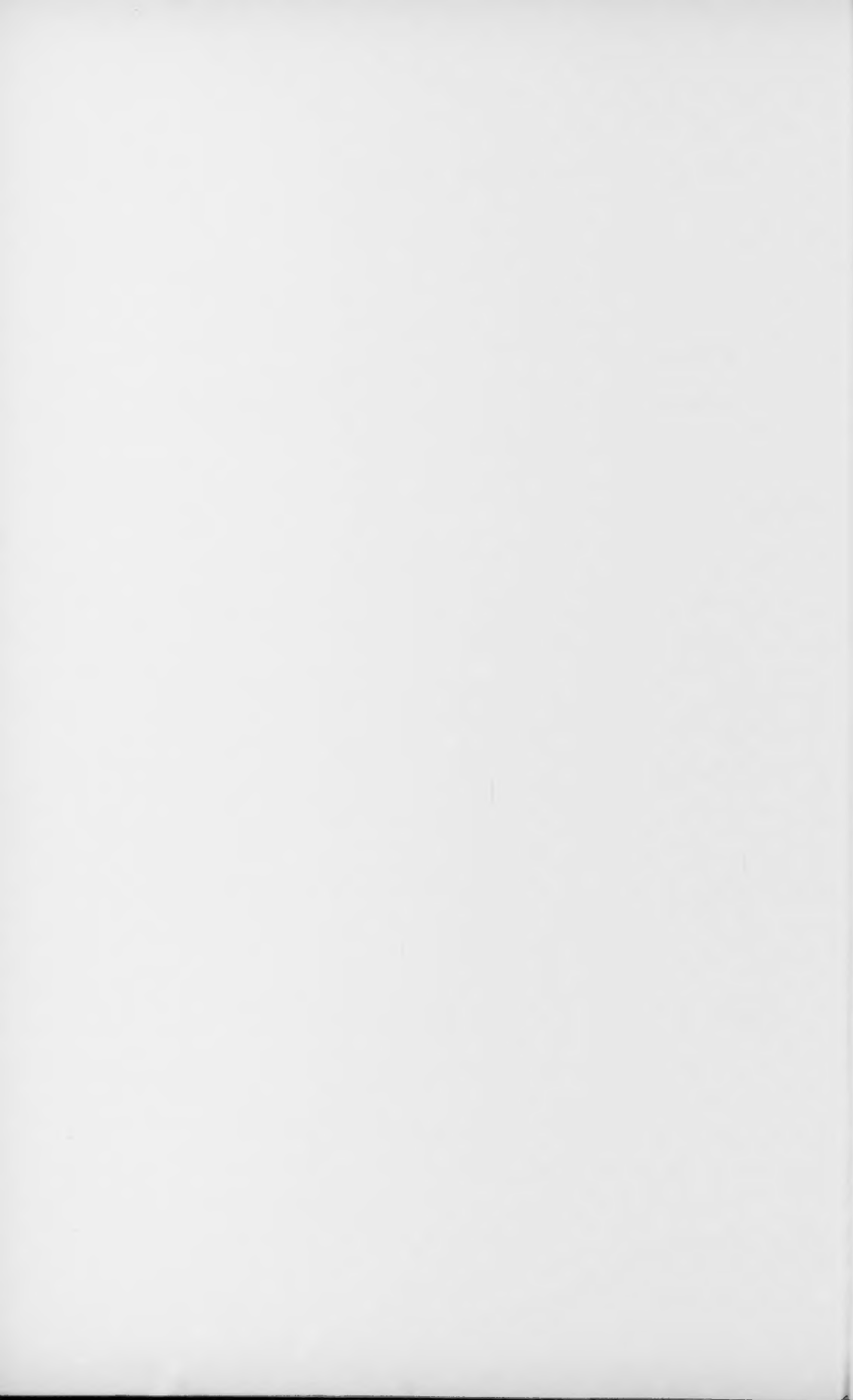
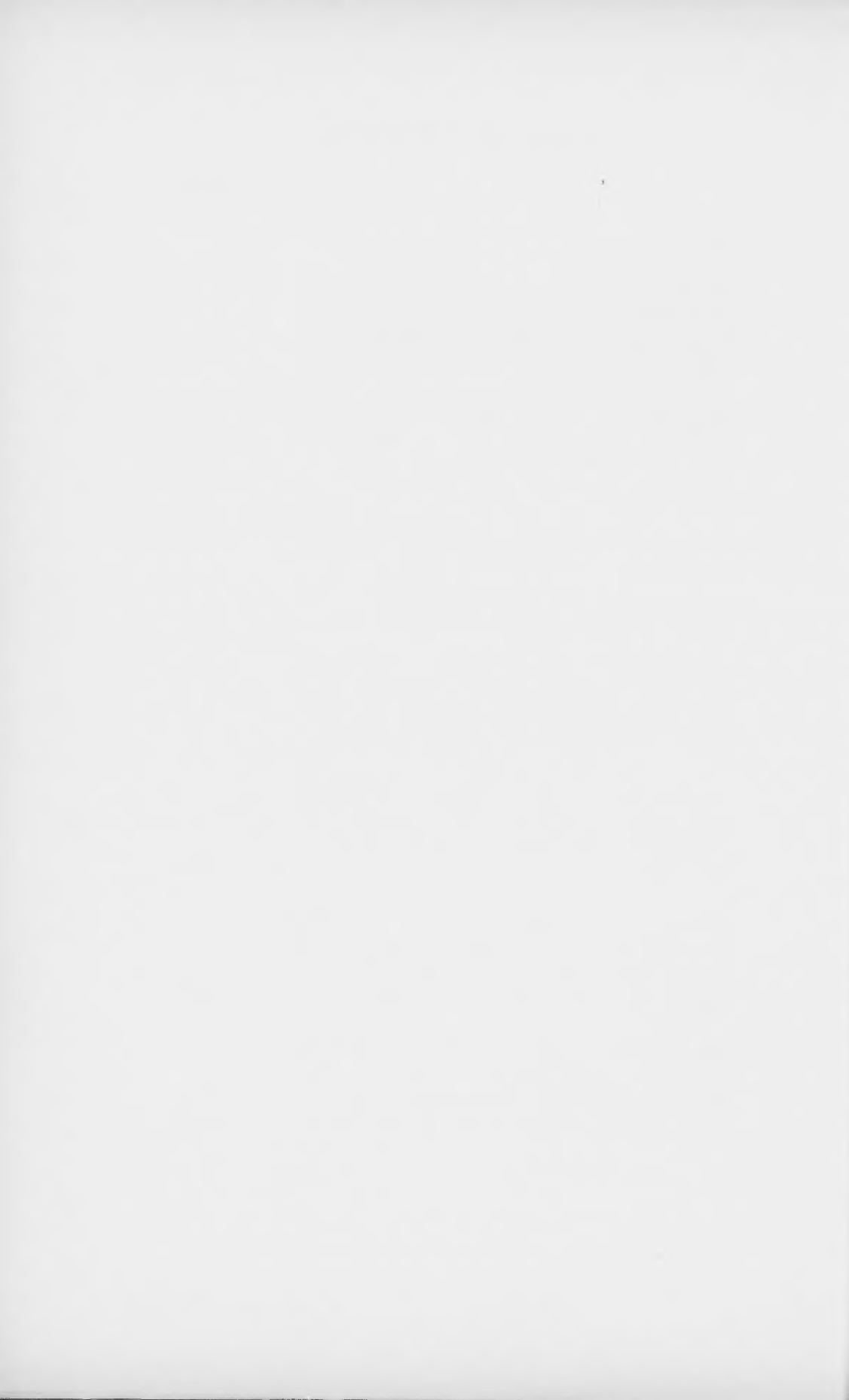


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**DECISION OF THE UNITED STATES COURT
OF THE APPEALS, SECOND CIRCUIT**

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLEK, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN D.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, DAVID LAWLOR, JIM CANNON,
JAMES DOYLE, NED LYNAM, EDWARD
BYRNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES, and
DIGNITY-NEW YORK,

Plaintiffs-Appellees,
Cross-Appellants,

v.

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his capacity as the
Mayor of the City of New York and the NEW
YORK CITY POLICE DEPARTMENT,

Defendants-Appellants,
Cross-Appellees.

Nos. 1548, 1552, Dockets
85-7509, 85-7511.

United States Court of Appeals
Second Circuit

Argued June 25, 1985
Decided June 28, 1985.

Stephen J. McGrath, New York City
(Leonard Koerner, David Drueding, Jonathan
L. Pines, Frederick A. O. Schwarz, Jr.,
Corp. Counsel of City of New York, New
York City, of counsel), for
defendants-appellants, cross-appellees.

Stuart W. Gold, New York City (Valerie
Caproni, Anne E. Verdon, New York City,
of counsel), for plaintiffs-appellees,
cross-appellants.

Before KEARSE, CARDAMONE and
FRIEDMAN,* Circuit Judges.

CARDAMONE, Circuit Judge:

Before St. Patrick's Cathedral on New York City's Fifth Avenue, is a 250 foot long public sidewalk whose width from the private steps of the Cathedral to the curb of Fifth Avenue is about 25 feet. Plaintiffs are members of a gay and lesbian Catholic group, Dignity-New York, claiming their right to freedom of speech. They seek to place 100 of their members on this sidewalk before the church to conduct a religious demonstration during the annual Gay Pride

* Honorable Daniel M. Friedman, Circuit Judge for the Federal Circuit, sitting by designation.



March. Defendants are the Police Commissioner and the Mayor of New York City and the City Police Department. Urging that its obligation to protect public order compels it to impose limits on the time, place and manner of plaintiffs' demonstration, the Police Department proposes "freezing" (clearing) the sidewalk during the parade. Instead, it has set aside a demonstration area for plaintiffs on 51st Street, adjacent to the Cathedral, and a similar designated area on 50th Street for anti-gay demonstrators.

Courts have the solemn responsibility when the First Amendment rights of a minority clash with the rights of others to preserve one while maintaining the other, without sacrificing either. Translating cherished freedoms enshrined in our Constitution to the harsh realities of the street is not an easy task. Because the

excuses offered for refusing to permit the fullest scope of free speech often are disguised, a court must carefully sort through the reasons offered to see if they are genuine. In this case, we believe they are. For the last two years a fair format for Dignity's demonstration on this occasion has evolved, which this year plaintiffs seek to expand. In order to maintain plaintiffs' rights while safeguarding the rights of the anticipated 75,000 marchers, those attending Sunday church services at the Cathedral and the public, the same general scenario as that followed in 1983 and 1984 should be adhered to again this year.

I

Plaintiffs Dignity-New York and a number of its members brought this action for declaratory and injunctive relief in the United States District Court for the Southern District of New York. Plaintiffs sought an

order enjoining the Police Department from carrying out its plan to close off the sidewalk in front of St. Patrick's Cathedral during the "Gay Pride March" along Fifth Avenue scheduled for this Sunday June 30, 1985, and thereby denying Dignity the right to demonstrate on the sidewalk during the march. Plaintiffs moved pursuant to Fed. R. Civ. P. 65 for a preliminary injunction.

By order dated June 18, 1985 the district court (Motley, Ch. J.) issued an order enjoining defendants from preventing a "reasonable" number of Dignity members from holding a demonstration on the Cathedral sidewalk, but expressly not prohibiting defendants from exercising their professional judgment to maintain order. The Police Department has appealed this order claiming that its plan constituted a reasonable time, place and manner restriction on plaintiffs' First Amendment rights and that the district



court abused its discretion by improperly substituting its judgment for that of the Police Department in weighing and determining the threat to public order. Plaintiffs also appeal claiming that the district court abused its discretion by issuing an order that was impermissibly vague because it failed to state a specific number of Dignity members that may remain on the Cathedral sidewalk. For reasons that follow, the order should be reversed and the preliminary injunction vacated.

II

As described by plaintiffs, the "Gay Pride March" is "the major public demonstration organized by the local gay and lesbian community every year." The march was first held in New York City in 1970, and over the years the Police Department and the march's organizers have established a



cooperative relationship that has helped to make the annual march a success. Last year approximately 75,000 people participated. While the marchers have generally proceeded without incident, they have not been free of harassment and violence by anti-homosexual demonstrators. During the 1981 march some participants, including members of Dignity, were assaulted on the steps of St. Patrick's Cathedral by self-appointed "protectors" of the Cathedral. As a result, the police detail was increased in 1982, but the sidewalk remained open. During the 1982 march, there were several instances in which provocative words were exchanged between demonstrators and counter-demonstrators, but no violence resulted. From 1976 through 1982 Dignity members stepped out of the line of march and gathered on the steps at the front of the Fifth Avenue entrance of St. Patrick's Cathedral and there participated in



a prayer service that continued through the duration of the march.

During the 1983 and 1984 parades the steps and sidewalk directly in front of St. Patrick's Cathedral were closed. Dignity officers were permitted to stop the line of march to lay a wreath on the sidewalk in front of the Cathedral and to hold a short prayer service in the street for 10-15 minutes. Both in 1983 and 1984 approximately 100 anti-gay demonstrators appeared. This year, as usual the parade will commence at Central Park South and run to the end of Fifth Avenue at Washington Square in Greenwich Village. The Police Department indicated that it would follow the same course for this year's march as it followed in 1983 and 1984, that is, closing the sidewalk but permitting Dignity officers to conduct a short prayer service on the



street in front of the Cathedral and to lay a wreath.

Less than two months ago Dignity instituted this action seeking to extend the demonstration rights granted them in 1983 and 1984. Plaintiffs want to locate 100 of their members on the sidewalk in front of the Cathedral for the duration of the march so that their demonstration may be witnessed by all the marchers. It is estimated that it will take several hours for the entire parade to pass a single spot. The Police Department avers that it does not have at hand sufficient resources to control what -- in New York City Police Commissioner Ward's opinion -- is a reasonable risk of a riot on Fifth Avenue were such a sidewalk demonstration to be permitted during a march of this year's size.

The district court concluded that any fear that the Gay Pride March in general and



the Dignity demonstration in particular will attract more violence this year than in past years were merely "speculative." The hearing record contains strong unrefuted evidence to the contrary. First, several lawsuits have been commenced against the City by groups attempting to enjoin the holding of the parade. Second, Catholic War Veterans and Knights of Columbus members have expressed strong opposition to gays gathering near the Cathedral. They and a group designated as the Committee to Defend the Cathedral are sending literature and mailings in an effort to recruit anti-gay demonstrators. Last year, some members of these groups overran the police barriers and claimed the police had "double-crossed" them by permitting Dignity to hold a service. Third, over the past year the Catholic Archdiocese of New York has taken a strong stand publicly against the economic interests

of gay people by refusing to hire them. Fourth, Dignity members in the past year have demonstrated more than once at the Cathedral. Fifth, this year's parade organizers met with the police in late May 1985 to inform them that according to their own "highly reliable" sources, a large number of Orthodox Jews from Brooklyn planned to block the parade route near 49th Street. The Grand Marshall of last year's parade said that if the police failed to remove the Jewish demonstrators forcibly, the marchers would. The police have considered all this information and as a result of their own investigation credit much of it. The police believe that the parade this year will be more volatile than in the past.

For these reasons, the City Police Department has concluded that prudence dictates that it must take reasonable



precautions to protect the marchers and the public from violence. It is the Department's position that no one should be allowed to demonstrate on the sidewalk in front of the Cathedral. The unrefuted testimony in the record establishes that it is Police Department policy not to permit demonstrations adjacent to the line of march, and not to permit demonstrations by antagonistic groups to be held near each other. Finally, this is not the only occasion when the sidewalk in front of a church has been closed to the general public. During the St. Patrick's Day Parade, and most others, the sidewalk in front of St. Patrick's is "frozen." The same is done, according to police testimony, with the sidewalk in front of Fifth Avenue's Temple Emmanuel.



III

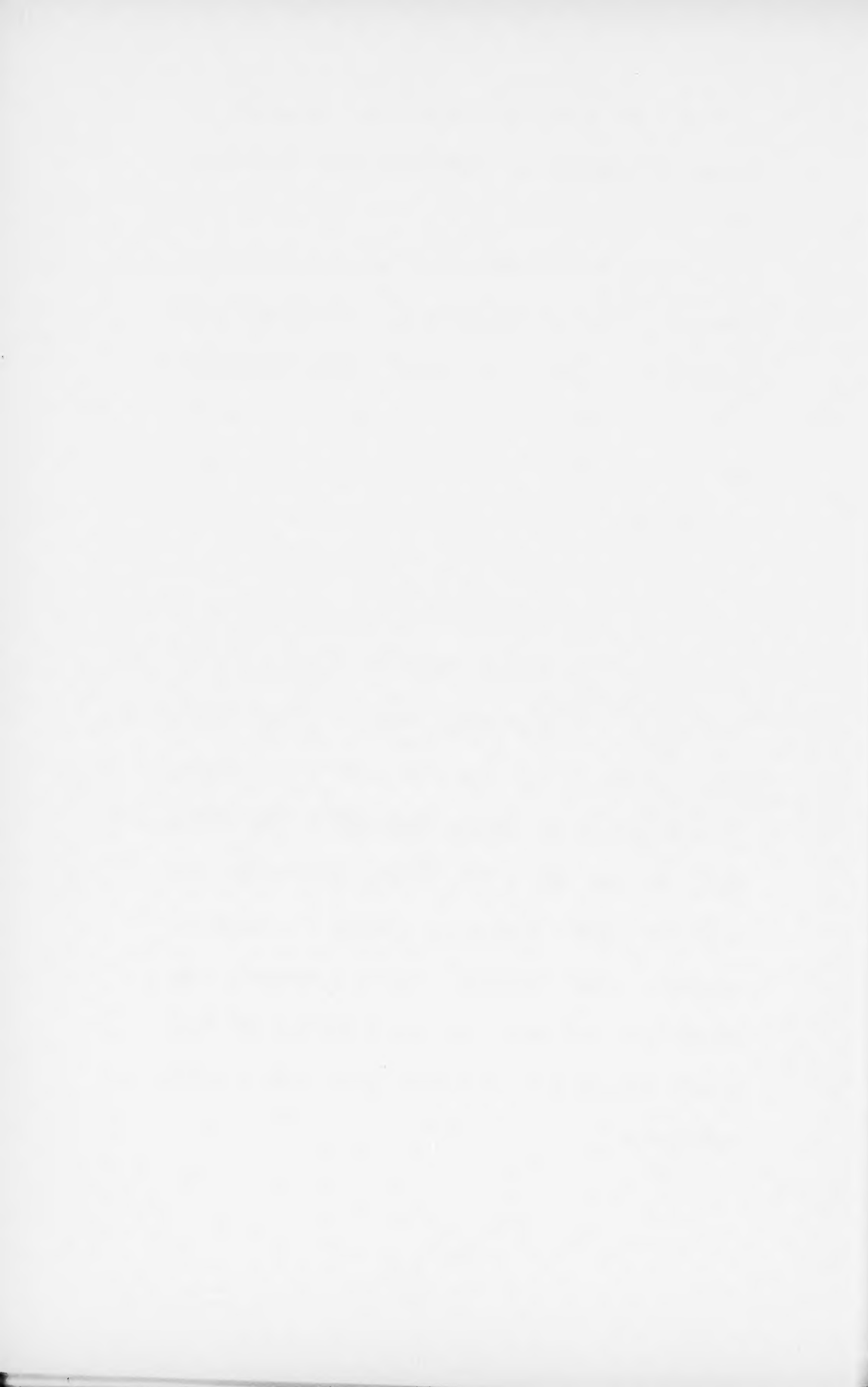
Although the right of access to a public forum for the discussion and interplay of ideas is fundamental in our democratic system, that right is not absolute. It is established that "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests." Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir. 1980) (quoting Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972)). The Police Department claims that its plan to freeze the sidewalk in front of St. Patrick's Cathedral during the Gay Pride March is such a reasonable time, place and manner limitation.

The standard to be employed in evaluating such a restriction, as the court below recognized, is:

1. It must be content-neutral;

2. It must be narrowly tailored to serve a significant governmental interest; and

3. It must leave open ample alternative channels for communication. Clark v. Community for Creative Non-Violence, __U.S.__, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). This Court's standard of review on appeal of a preliminary injunction is "whether issuance of the preliminary injunction, in light of the applicable legal standards, constitute[s] an abuse of discretion." LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 74 (2d Cir. 1985) (citing Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648 (1975)). When evaluating whether the district court abused its discretion, we must let its findings of fact stand unless we find that they are clearly erroneous.



Dignity asserts that the Police Department's proposed freeze of the sidewalk is not content-neutral because it is an ad hoc response to one specific controversy, that is a kind of "heckler's veto." On the contrary, the undisputed testimony on the record plainly shows that this action is completely consistent with an established policy of the Police Department to keep demonstrators away from the line of march of a parade, and to keep demonstrators and counter-demonstrators away from each other. The Department has developed his common sense policy in order to uphold its statutory obligation to "preserve public peace," to disperse "assemblages which obstruct the free passage of public streets, sidewalks, parks, and places," and to "protect the rights of persons and property." New York City Charter § 435. In this case the restriction is being imposed on plaintiffs and



their adversaries, both of whom have expressed to the Department a desire to occupy the same Cathedral sidewalk during the same June 30th March.

Further, the restrictions has been narrowly tailored to further an important government objective. Unquestionably, maintenance of the public order is such an aim. Here, the Police Department fears an outbreak of violence during a march with an estimated 75,000 participants. The district court found no such danger of violence. After an exhaustive review of the hearing record, we can come to no other conclusion than that the district judge's finding on this point is clearly erroneous. The record shows, as noted, that what has always been a confrontation situation promises to become much more volatile this year. Given this fact, the Department has not proposed that the demonstrators be silenced, it seeks only



to keep the demonstrations a reasonable distance from both the marchers and from each other.

Finally, the demonstrators have been afforded ample alternative channels for communication. The Police Department's proposal would allow the Dignity demonstrators to demonstrate in a side street near the Cathedral. It would also permit them, as in the past two years, to stop the parade, conduct a short service in the street in front of the Cathedral, and lay a wreath on the Cathedral sidewalk. Thus the group is not stopped from conveying its message. They are merely not being allowed their preferred forum for demonstration.

Dignity argues that the threat of disruption and possible violence by anti-gay demonstrators does not justify the police ban on use of the sidewalk by Dignity to conduct its demonstration as it is the police's

responsibility to curb hostile demonstrators. We cannot agree. The fundamental responsibility of the police is to preserve public order and protect the marchers; the police legitimately are concerned that they could not perform those functions if Dignity conducted its proposed sidewalk demonstration. This type of determination is uniquely within the Police Department's expertise. It is no answer to say that the police nevertheless should find some way to accomplish those objectives while permitting the very Dignity demonstration that threatens the ability of the police to maintain control of the situation.

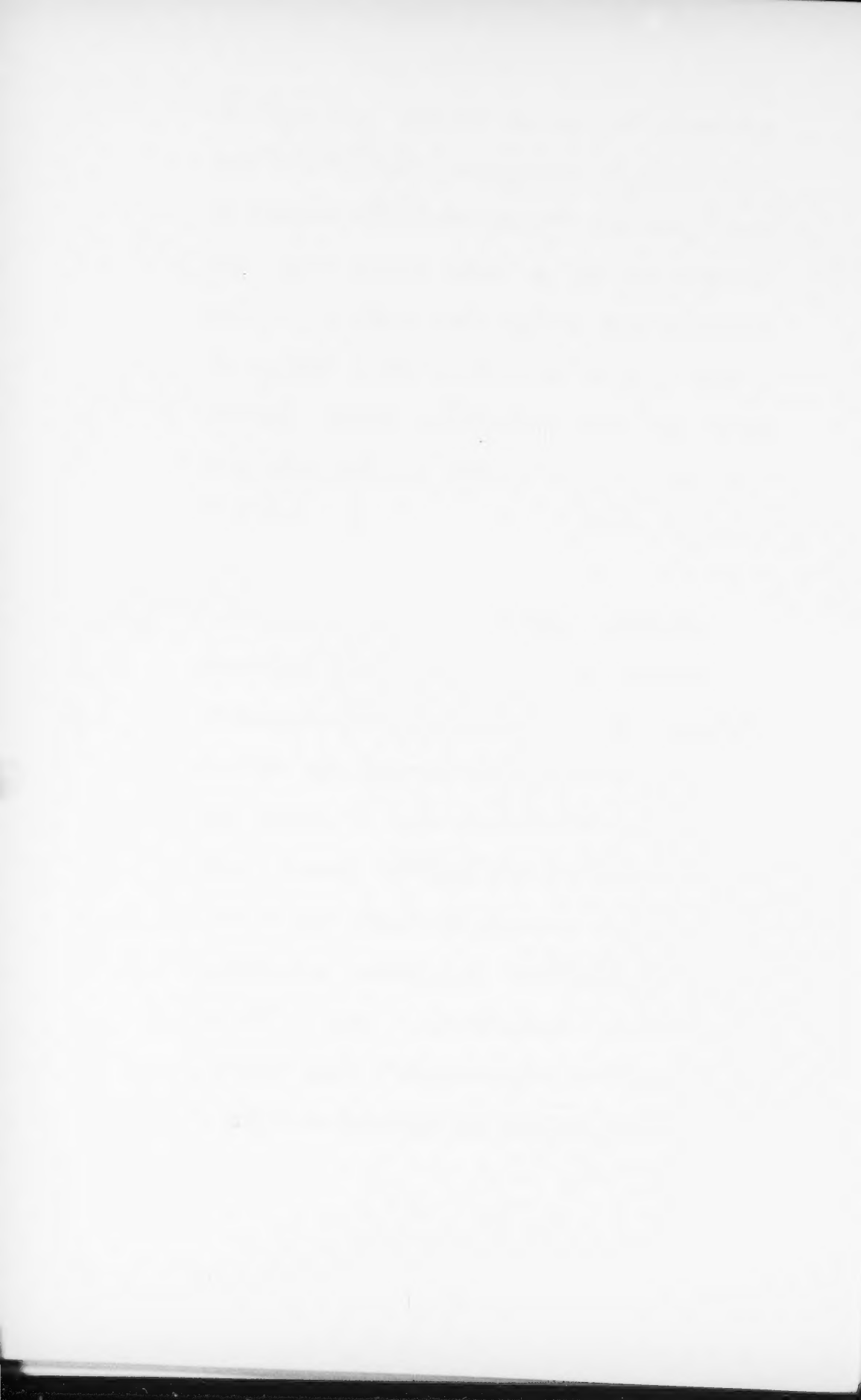
Accordingly, we hold that the district court abused this discretion by issuing the preliminary injunction. The order of the district court is therefore reversed, the injunction vacated, and the matter remanded to the district court with directions to order



defendant to permit Dignity no less an opportunity to demonstrate than in 1983 and 1984. That is, Dignity should be allowed to demonstrate on a side street near the Cathedral and to halt the parade to conduct a short prayer service on Fifth Avenue in front of the Cathedral, which service includes laying a wreath on the Cathedral sidewalk.

KEARSE, Circuit Judge, dissenting:

Though I think this case presents difficult practical and conceptual questions, and although I would modify the district court's injunction for the sake of clarity and enforceability, I respectfully dissent from the majority's decision to vacate the district court's preliminary injunction prohibiting defendants (collectively the "Police Department" or "Department") from barring plaintiffs from using the sidewalk in front of



St. Patrick's Cathedral for a demonstration during the "Gay Pride March" scheduled for June 30, 1985.

The standard in this Circuit for the issuance of a preliminary injunction requires the moving party to establish (1) irreparable harm and (2) either (a) a likelihood of success on the merits, or (b) a sufficiently serious ground for litigation and a balance of hardships tipping decidedly in its favor. E.g., Sperry International Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam). The ultimate question on appellate review of a district court's issuance of a preliminary injunction is whether, in light of the applicable standard, the court has abused its discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648

(1975); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979). Such an abuse of discretion may take the form of an erroneous view of the law, or error in findings of fact, or error in the form of the injunction. E.g., Coca-Cola Co. v. Tropicana Products, Inc., 690 F.2d 312, 315 (2d Cir. 1982).

Since "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); see also 414 Theatre Corp. v. Murphy, 499 F.2d 1155, 1160 (2d Cir. 1974), the sole question on this appeal, apart from the form of the injunction, is whether the district court erred in ruling that plaintiffs had shown a likelihood of success on the merits of their claim.



A. THE MERITS OF THE FIRST AMENDMENT CLAIM

The claim of the plaintiffs, who are Catholic homosexuals, is that the sidewalk in front of St. Patrick's Cathedral is a public forum that is uniquely suited to the message they wish to convey, which is that notwithstanding the disapproval of their homosexuality by the Catholic Archdiocese of New York, they wish to remain within the mainstream of Catholicism; that they have a First Amendment right to use that forum to express this message; and that the Department's plan to deny them access to that forum by barring virtually all speech from the sidewalk during the March abridges that right. Since there can be little doubt that the sidewalk in front of St. Patrick's is a "quintessential public forum[]," Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983);

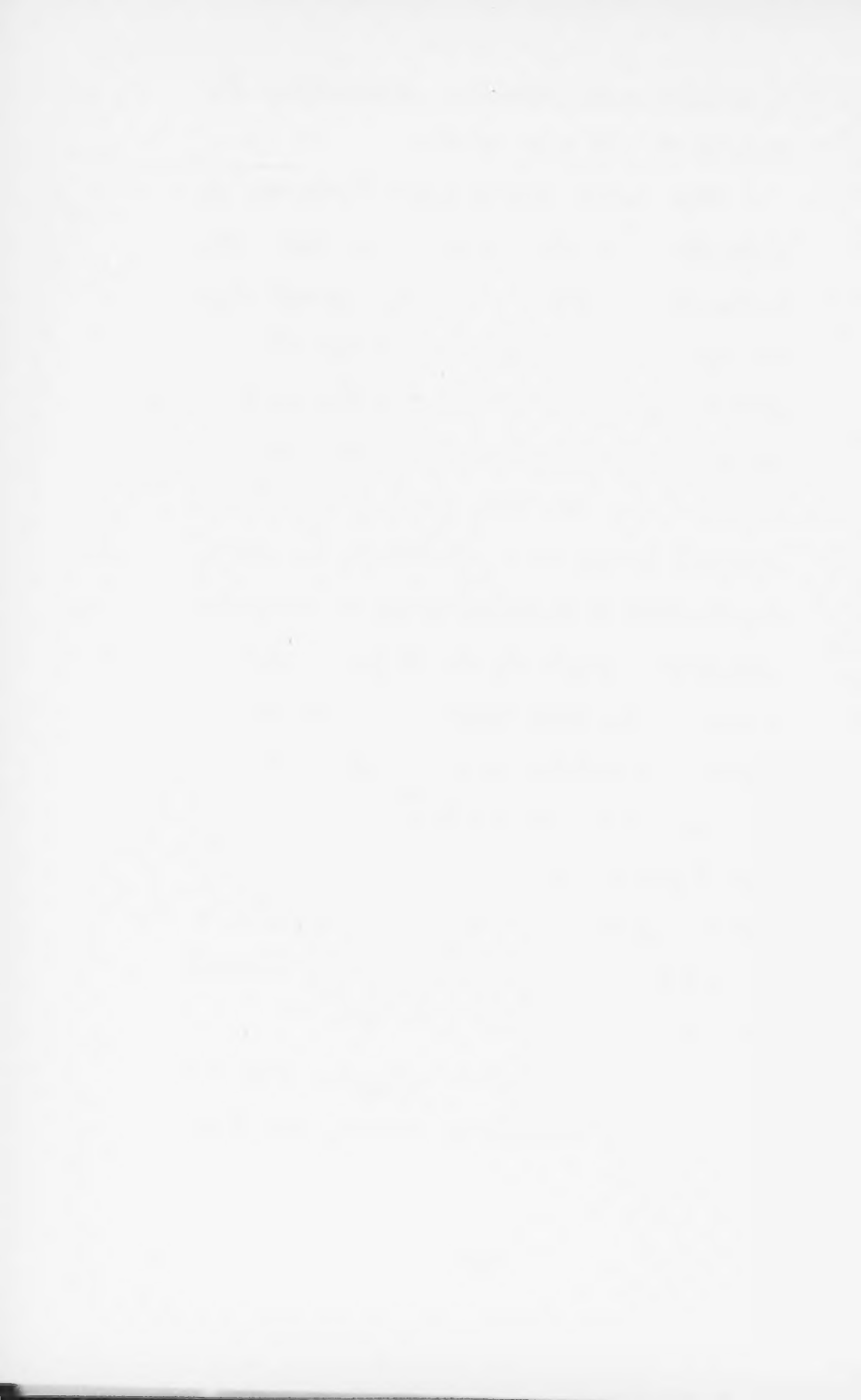
accord United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983); Carey v. Brown, 447 U.S. 455, 460, 100 S.Ct. 2286, 2289, 65 L.Ed.2d 263 (1980); Hudgens v. NLRB, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976), the focus must be on whether the Department's special plan to close that forum to plaintiff's group during the March was a valid "time, place, and manner" regulation, i.e., one that was "justified" without reference to the content of the regulated speech, that . . . [was] narrowly tailored to serve a significant governmental interest, and that . . . le[ft] open ample alternative channels of communication of the information." Clark v. Community for Creative Non-Violence, __U.S.__, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984); accord United States v. Grace 461 U.S. at 177, 103 S.Ct. at 1706; Perry Education Association



U.S. at 45, 103 S.Ct. at 954.

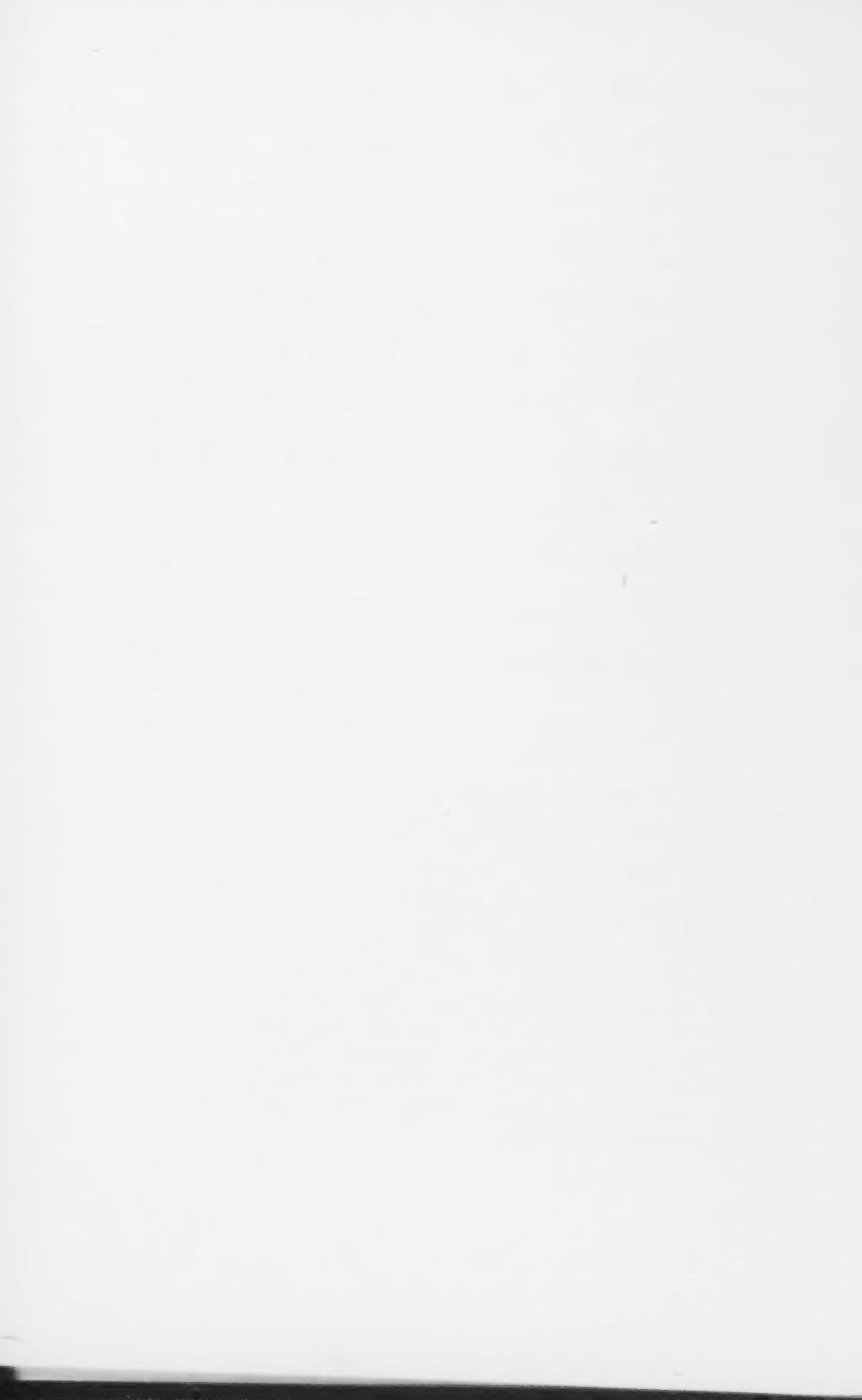
The Police Department's response to plaintiffs' current request to use the Cathedral sidewalk in a parade-long ceremony was, as it was in 1983 and 1984, to prohibit their use of the sidewalk entirely except to permit the parade to pause when it reaches St. Patrick's for a 15-minute ceremony in the street, and to permit one or two members of plaintiffs' group to enter the Cathedral sidewalk to lay there a symbolic wreath. The Department would also permit plaintiffs to conduct a parade-long ceremony on a side street across from the Cathedral. The Department's view is that any greater use by plaintiffs of the sidewalk in front of St. Patrick's would unreasonably increase the risk of violence.

The risk of violence comes not from the plaintiffs, as defendants concede, but from



groups hostile to plaintiffs.¹ However, the implementation of but two of the Department's usual policies should suffice to minimize the risk of violence without any need to bar plaintiffs from the Cathedral sidewalk. First, the Department's general policy is to separate mutually antagonistic demonstrations by the distance of at least one city block and to keep such demonstrations out of sight and hearing of each other. Second, its policy is to prohibit hostile demonstrations from occupying the

¹ This factor distinguishes the present case from Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir. 1980), where this Court upheld a Department policy of restricting those who sought to demonstrate in front of the Russian Mission to a "bullpen" more than 100 feet from the Mission's entrance. There, it was the demonstrators themselves who posed the threat of violence, which threat was inherent in their proximity to the Mission. Here, by contrast, any threat of violence comes not from plaintiffs but from the anti-gay counterdemonstrators.



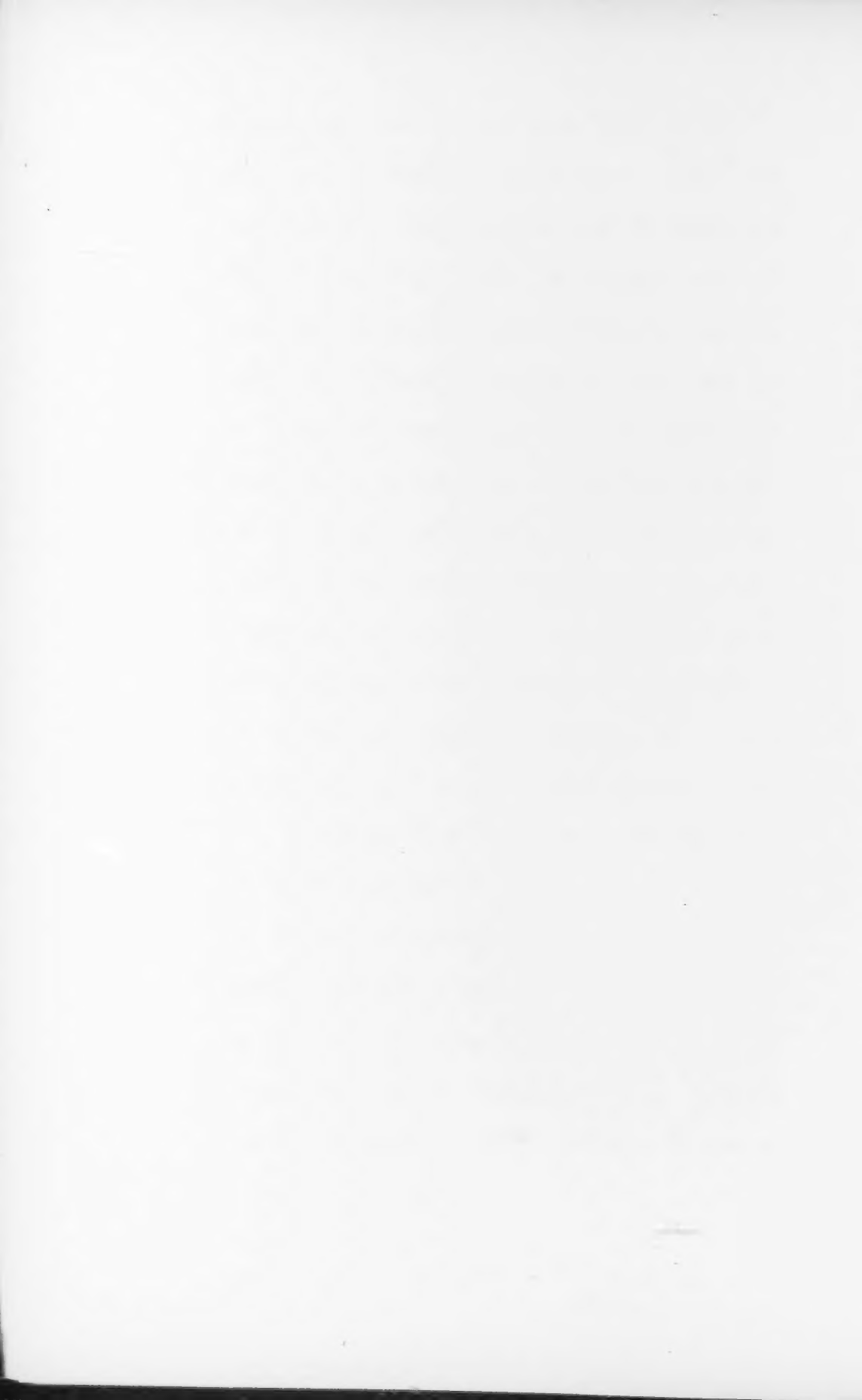
sidewalk directly adjacent to a parade possessing an official permit.² Implementation of these policies would appear to provide the safeguards normally established by the Department even if plaintiffs' group were to occupy the sidewalk in front of St. Patrick's.

² The majority states this second policy as prohibiting all demonstrations from occupying a sidewalk directly adjacent to a parade. I find no support for this in the record. Not only were plaintiffs themselves permitted to conduct such a demonstration on the steps and sidewalk in front of St. Patrick's in conjunction with the March prior to 1983, but Catholic leaders and their invited guests, sometimes numbering several hundred, are consistently permitted to occupy the sidewalk in front of the Cathedral and to greet dignitaries passing in the line of march during, for example, the St. Patrick's Day Parade, the Puerto Rican Day Parade, and the Columbus Day Parade. Further, as discussed infra, the Department has conceded that if there were no threat of hostile counterdemonstrations, plaintiffs' use of the sidewalk in front of the Cathedral would be permitted.



It is clear from the record, and counsel for the Department conceded at oral argument of this appeal, that if it were not for the threats of certain anti-gay Catholic groups, plaintiffs' group would be permitted to use the Cathedral sidewalk. Further, according to a Department official, the Catholic anti-gay groups would be perfectly satisfied with the Department plan to bar everyone from the Cathedral sidewalk since their primary goal is to prevent plaintiffs' group from occupying that location. The latter fact confirms plaintiffs' contention that the Cathedral sidewalk is a forum of especial symbolic significance for their message.

Given these facts, it becomes clear that the only reason the Department seeks to bar plaintiffs' group from the Cathedral sidewalk is because of the threats of the anti-gay groups. This response by the Department, in lieu of reliance on its more usual policy of



providing a one-block buffer zone from whatever the site of plaintiffs' demonstration may be, plainly has given the Catholic anti-gay groups a classic "heckler's veto." Such a veto has consistently been rejected by the courts as a valid basis for restricting the exercise of free speech in a traditional public forum, see, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 615-16, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971); Bachellar v. Maryland, 397 U.S. 564, 567, 90 S.Ct. 1312, 1314, 25 L.Ed.2d 570 (1970); Gregory v. Chicago, 394 U.S. 111, 117, 89 S.Ct. 946, 949, 22 L.Ed.2d 134 (1969); Terminiello v. City of Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-896, 22 L.Ed.2d 134 (1949); Wiegand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974), cert. denied 421 U.S. 924, 95 S.Ct. 1650, 44 L.Ed.2d 83 (1975); Beckerman v. City of Tupelo, 664 F.2d 502, 509-10 (5th Cir. 1981); Collins v. Chicago



Park District, 460 F.2d 746, 754-55 (7th Cir. 1972), and was, in my view, properly rejected by the district court here.

The Department argues that allowing plaintiffs to use the sidewalk while denying such use to the anti-gay counter-demonstrators would impair the content neutrality of its policies. I view this invocation of First Amendment doctrine in order to bar virtually all expression from an area in which at least one group's speech would otherwise be fully permitted under the Department's usual policies as an untoward ironic twist. The essence of the Amendment is to promote speech rather than to inhibit it. The Department's argument suggests that whenever two groups seek to speak in the same public place at the same time, if both cannot be simultaneously accommodated both should be prohibited from speaking. The notion of content-neutrality mandated by



the First Amendment surely does not lead to such a result. Rather, that principle requires that when there are more individuals or groups seeking to use a public forum than can safely be accommodated, the state must select from among them on a basis other than its evaluation of the view that each seeks to express. Here, the Department refused to make any selection at all, whether through the application of its usual policies or otherwise, and by a misguided invocation of content-neutrality, it seeks unnecessarily to restrict the speech of all.

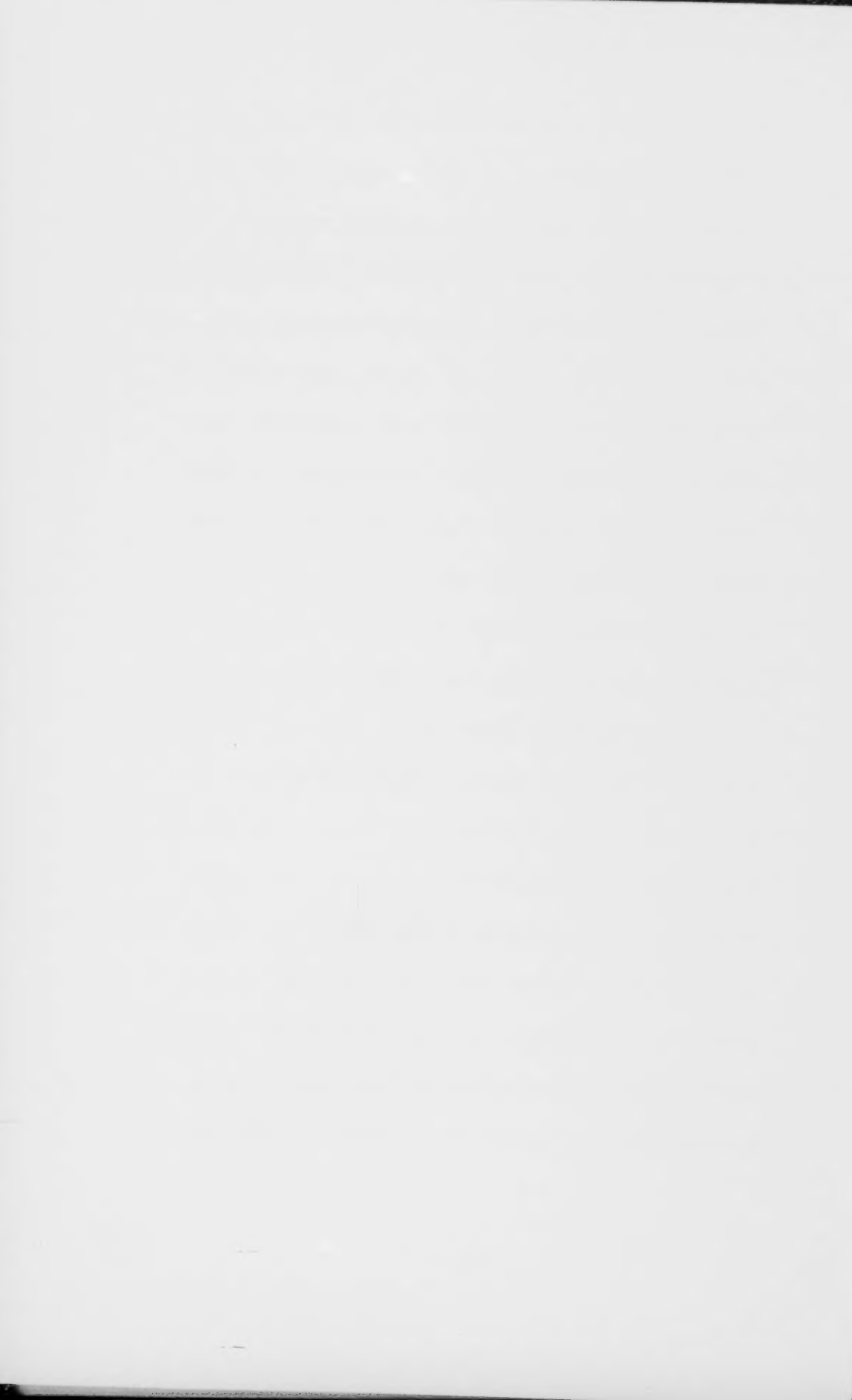
I do not view the Supreme Court's language in Clark v. Community for Creative Non-Violence, 104 S.Ct. at 3072, as requiring substantial deference to the view of the Police Department in this matter. In Clark, the Court intimated that the judiciary should not second-guess the Park Service's



balancing of interests which led to its policy of restricting overnight camping in the parks to designated areas. The regulation there at issue particularized a long-standing policy of the Park Service that was directed primarily at the regulation of camping, not of expression. See 36 C.F.R. §50.27(a) (1984); 24 Fed.Reg. 11,014 (1959). In the present case, the challenged plan was one designed directly to regulate freedom of expression, and I think the district court was required to evaluate that response within the traditional analytical framework.

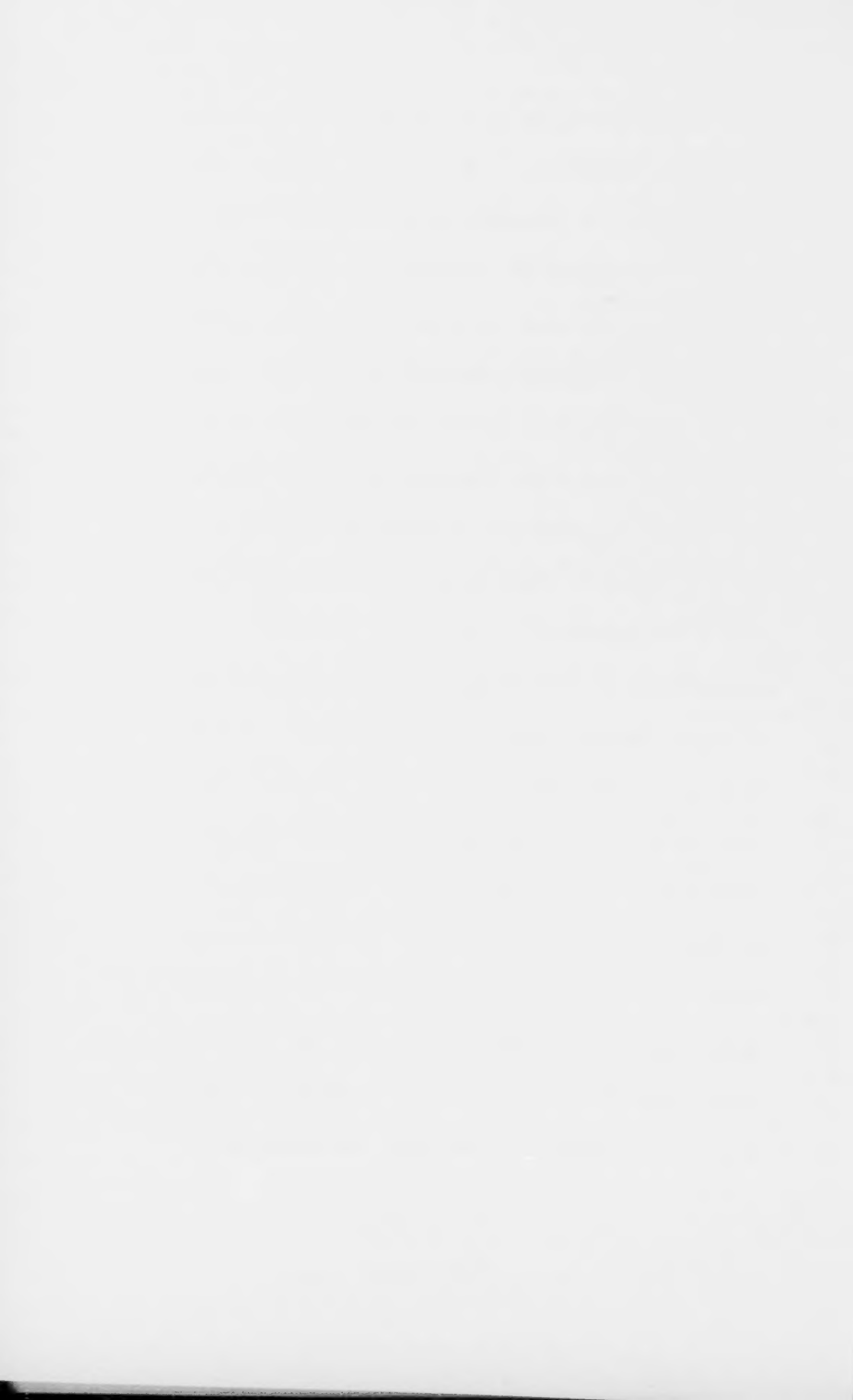
As to the Department's concerns for protecting the safety of participants in the parade and other members of the public, which of course are conceptually legitimate, the district court found that the Department had overstated the danger of a confrontation in the event plaintiffs' group were permitted to occupy the Cathedral sidewalk. I see no

basis in the record to hold this finding clearly erroneous; and even if the "independent appellant review" standard suggested in Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 104 S.Ct. 1949, 1984, 80 L.Ed. 502 (1984), were to apply, I would not consider the district court's finding erroneous. The record shows that a Gay Pride March has been held each year since 1970; plaintiffs' group, Dignity of New York, has conducted a special service in front of St. Patrick's each year since at least 1976; prior to 1983, Dignity's special service was conducted on the steps and sidewalk in front of St. Patrick's throughout the parade; in 1981, there were two isolated instances of violence, each instigated by and involving a single anti-gay individual; in the following year, plaintiff's group conducted the same type of parade-long ceremony as it had in 1981 on



the Cathedral steps and sidewalk, and there were no incidents. In recent years the Department has annually predicted that there would be massive violent confrontations between gays and anti-gays in the area around St. Patrick's during the March; but except for the two minor incidents in 1981, there has been no violence attendant upon the March or plaintiffs' special proceedings.

In light of this record, and in light of the Department's standard policy of maintaining a one-block buffer zone between mutually antagonistic demonstrations, I would not upset the district court's finding that the Department's concern for safety was not sufficiently particularized and well-grounded in fact to justify its blanket ban of plaintiffs from the Cathedral sidewalk. I conclude that the district court applied the correct legal principles, that its findings of fact were not erroneous, and that the granting of



injunctive relief in plaintiffs' favor was not an abuse of discretion.

B. The Form of the Injunction

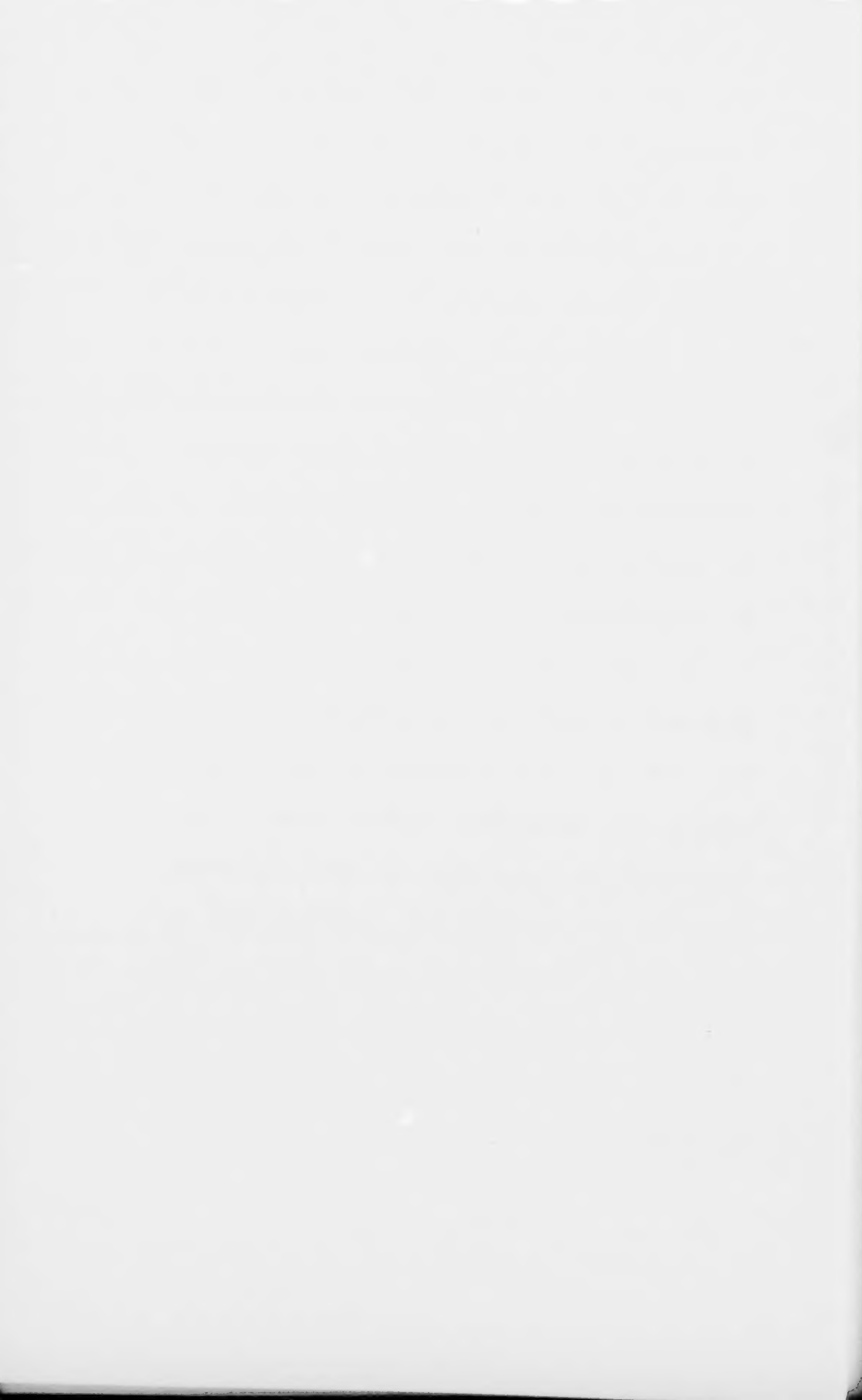
Notwithstanding my agreement with the district court that an injunction premitting plaintiffs to occupy the Cathedral sidewalk is appropriate, I believe the injunction as entered is not sufficiently "specific in terms," Fed.R.Civ. P. 65(d). While often it may suffice to order a party to proceed in a "reasonable" manner, it appears to me that the inflexible position taken by the Department forecloses such an approach here.

The Department adheres to the position that it is unreasonable to permit more than one or two members of plaintiffs' group to enter the Cathedral sidewalk. If, in the face of that adherence, the court orders only that plaintiffs be permitted to enter



that area in "reasonable" numbers, the Department may arguably proceed on the basis that its view of what is reasonable has not been rejected by the court. This would make it difficult on June 30 for plaintiffs to show on-the-scene officials an order requiring that more than one or two of them be allowed on the sidewalk, and difficult thereafter to obtain judicial enforcement of the court's order in the event those officials are unpersuaded on June 30.

At the hearing below, the court appeared to reject the Department's position that one or two constituted the largest number of plaintiffs' group that could reasonably be permitted on the Cathedral sidewalk, and appeared to indicate that it considered plaintiffs' proposed 100 to be reasonable. While it is difficult to quantify precisely what is "reasonable," it appears to me that, in the face of the Department's



adamant refusal to exercise any discretion as to what number greater than one or two may be reasonable, the court should, for the protection of both sides, specify a number.

Accordingly, I would be inclined to construe the district court's use of the term "reasonable" as meaning approximately 100, and would direct (1) that the injunction be thus clarified, or (2) that the district court clarify the injunction by inserting in it such other number as that court considers more appropriate.



ORDER OF THE UNITED STATES DISTRICT
COURT OF THE SOUTHERN DISTRICT OF
NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLE, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN R.
EDWARDS, JOSEPH BROWN, JULIUS J.
SPOHN, BERNARD L. TANSEY, CLINT
WINANT, JAMES DOYLE, DAVID LAWLOR,
JIM CANNON, NED LYNAM, EDWARD
BRYNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES and
DIGNITY-NEW YORK,

Plaintiffs,

-against-

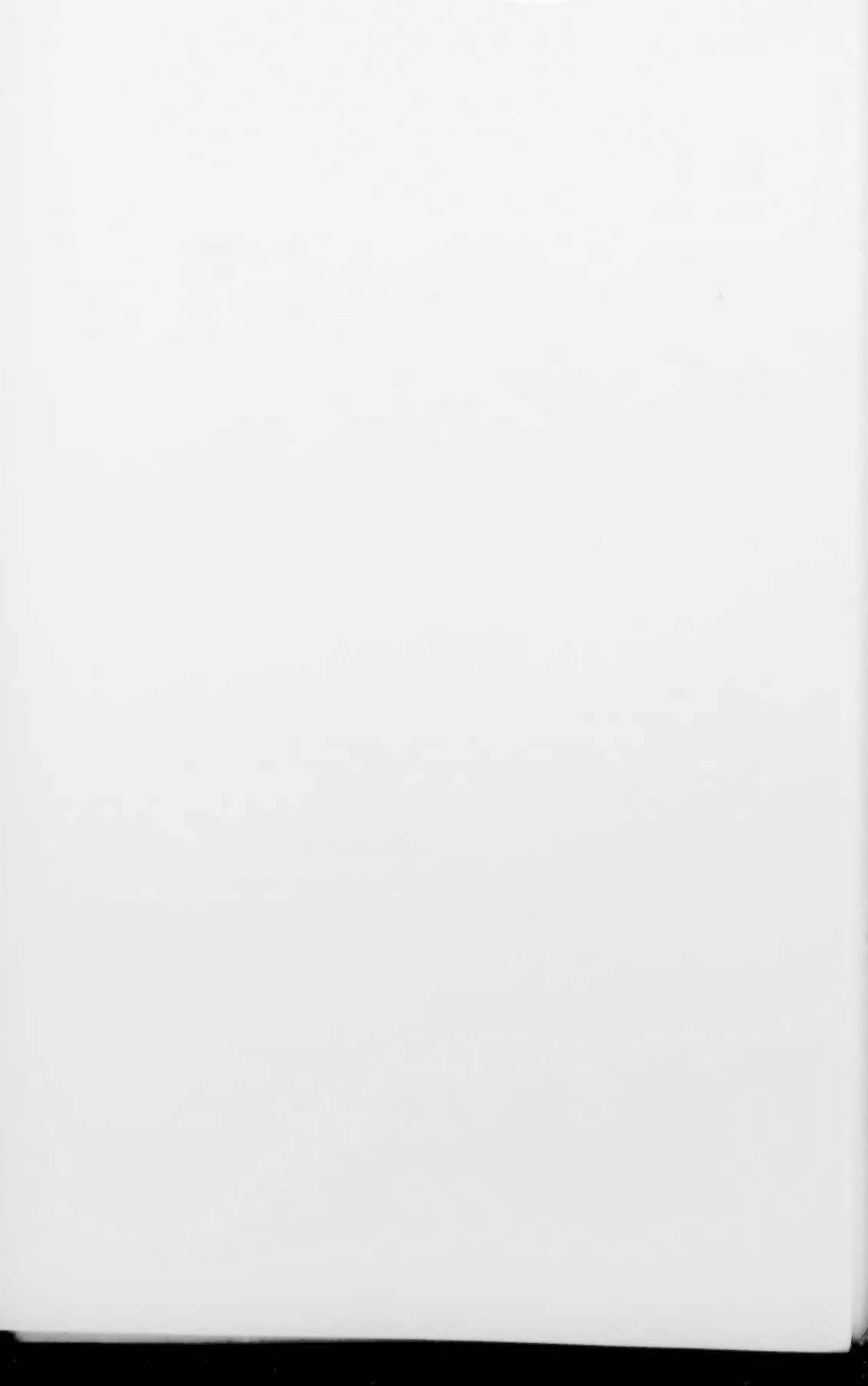
BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his capacity as the
Mayor of the City of New York, and the NEW
YORK CITY POLICE DEPARTMENT,

Defendants.

JUNE 18, 1985

ORDER

The court having issued findings of
fact and conclusions of law in the above-



captioned matter on June 13, 1985, and the court having examined the plan produced pursuant to the court's order by defendant New York City Police Department, received as Exhibit C, and the court having concluded that said plan will accommodate the First Amendment rights of plaintiffs while permitting defendants to maintain public order, it is hereby

ORDERED that, in accordance with the court's findings of fact and conclusions of law and order of June 13, defendants be and hereby are enjoined from preventing a reasonable number of plaintiffs' members from holding a peaceful demonstration on the sidewalk in front of St. Patrick's Cathedral on Fifth Avenue between Fiftieth and Fifty-First Streets in New York City during the "Gay Pride March" on Sunday, June 30, 1985. It is further

ORDERED that defendants are not prohibited from exercising their professional judgment to maintain order through the reasonable restrictions suggested in Exhibit C or through more restrictive emergency measures if public order and safety are threatened during the March itself. It is further

ORDERED that this order is stayed pending defendants' expedited appeal.

SO ORDERED

CONSTANCE BAKER MOTLEY
Chief Judge

Dated: New York, New York
June 18, 1985



DECISION OF THE UNITED STATES
DISTRICT COURT SOUTHERN DISTRICT OF
NEW YORK

MICHAEL J. OLIVIERI, J. MATTHEW
FOREMAN, MICHAEL DILLINGER, TOM
KOHLE, RICHARD FERRARA, EDMUND W.
TRUST, HUGH R. BRUCE, JOHN D.
EDWARDS, JOSEPH BROWN, JULIUS J.
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WINANT, JAMES DOYLE, DAVID LAWLOR,
JIM CANNON, NED LYNAM, EDWARD
BYRNE, MICHAEL CONLEY, EDWARD
HARBUR, ROBERT J. BUEL, CHRISTOPHER
WESOLOWSKI, GARY W. SPOKES,
DIGNITY-NEW YORK,

Plaintiffs,

- v. -

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York and the
NEW YORK CITY POLICE DEPARTMENT,

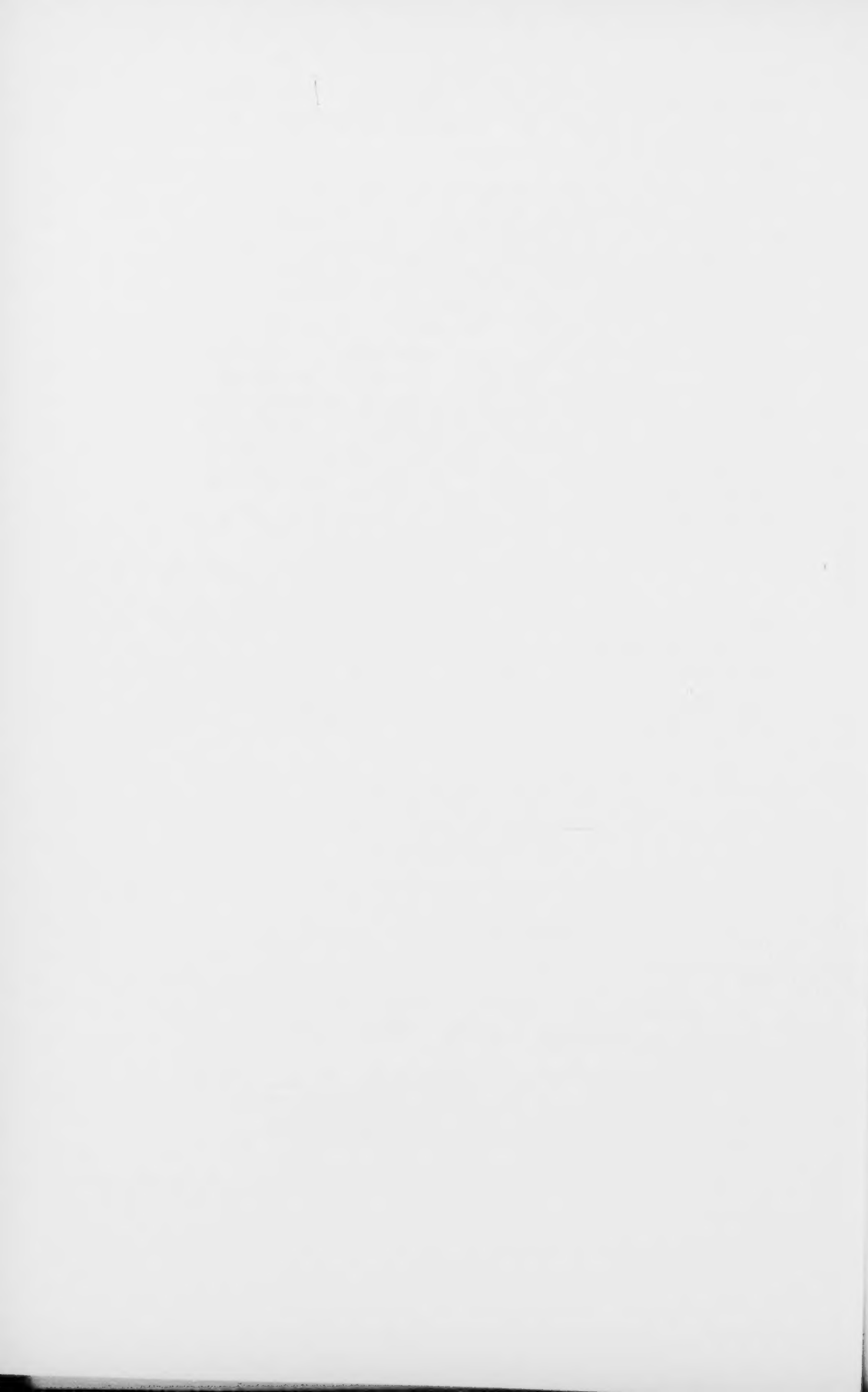
Defendants.

No. 85 Civ. 3269 (CBM).
United States District Court,
S.D. New York.

June 13, 1985.

Suaurt W. Gold, Anne E. Verdon,
Valerie Caproni, New York City, for
plaintiffs.

Frederick A.O. Schwarz, Jr., Corp.
Counsel by David D. Drueding, Jonathan L.
Pines, New York City, for defendants.



FINDINGS OF FACT AND
CONCLUSIONS OF LAW

MOTLEY, Chief Judge.

Plaintiffs seek to enjoin defendants, on the basis of the First Amendment, from prohibiting them from demonstrating on the public sidewalk in front of St. Patrick's Cathedral during the annual "Gay Pride March" to be held in New York City on June 30, 1985. Defendants maintain that in order to prevent a hostile confrontation between plaintiffs and certain antagonistic demonstrators, both groups must be banned from the sidewalk and relegated to controlled demonstration areas across Fifth Avenue. The matter is before the court on the motion of plaintiffs for a preliminary injunction. A hearing was held on the motion on May 24, 28, and 29 and June 12. The court now makes the following findings of fact and conclusions of law.

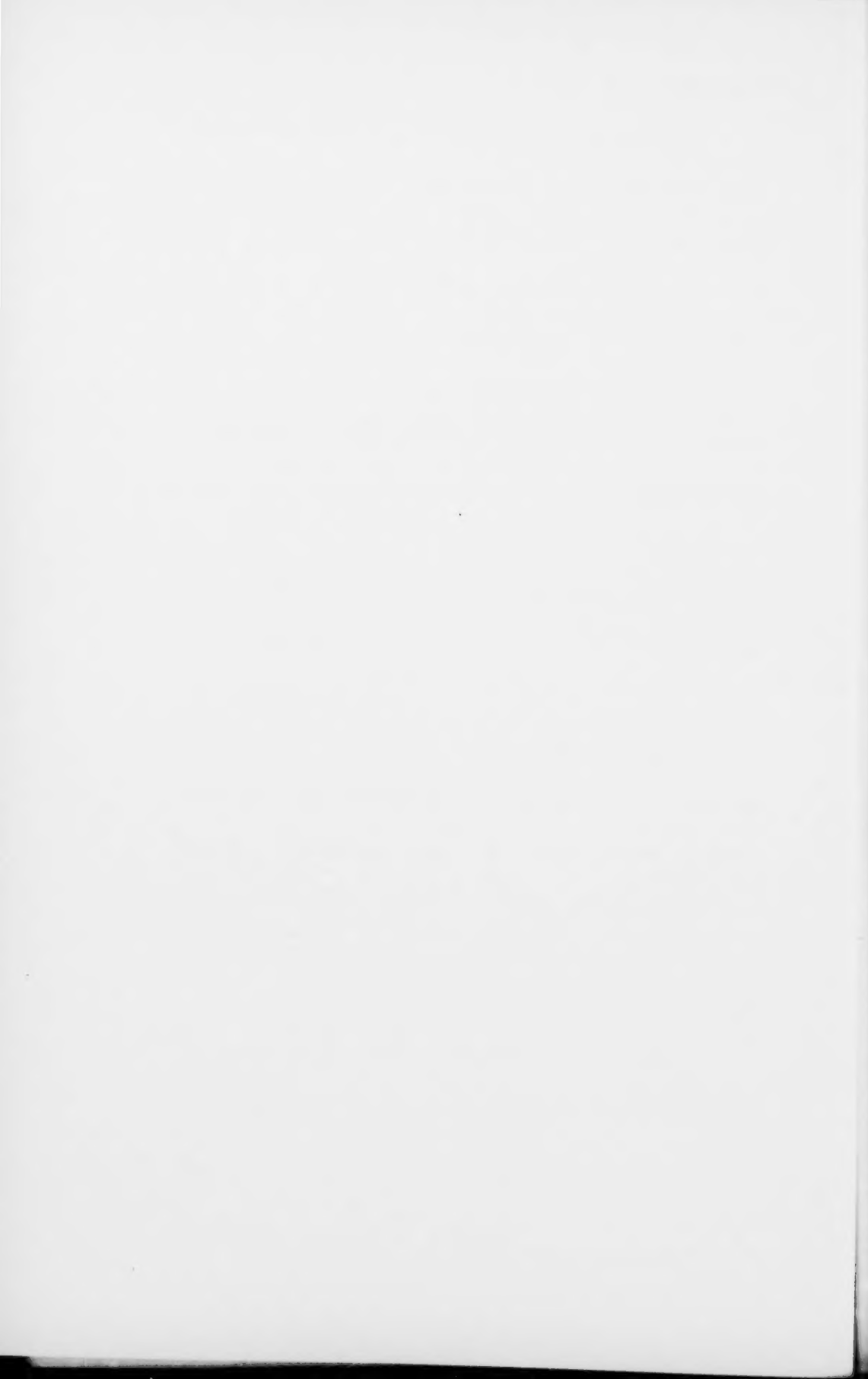


FINDINGS OF FACT:

Argument before the court has revealed that the following facts are not in dispute. They are therefore adopted as findings of the court. Plaintiffs are Dignity-New York (Dignity), an organization of homosexuals who are also Catholics, and several of its members. Defendants are the New York City Police Department, its Commissioner, and the Mayor.

Every year since 1970, there has been held in New York City a "Gay Pride March," which is the major annual demonstration of solidarity organized by the local gay and lesbian community. Approximately 75,000 people take part in the parade, which proceeds down Fifth Avenue from Central Park to Washington Square. This year's March is scheduled for June 30.

From 1976 through 1982, members of Dignity were permitted to step out of the



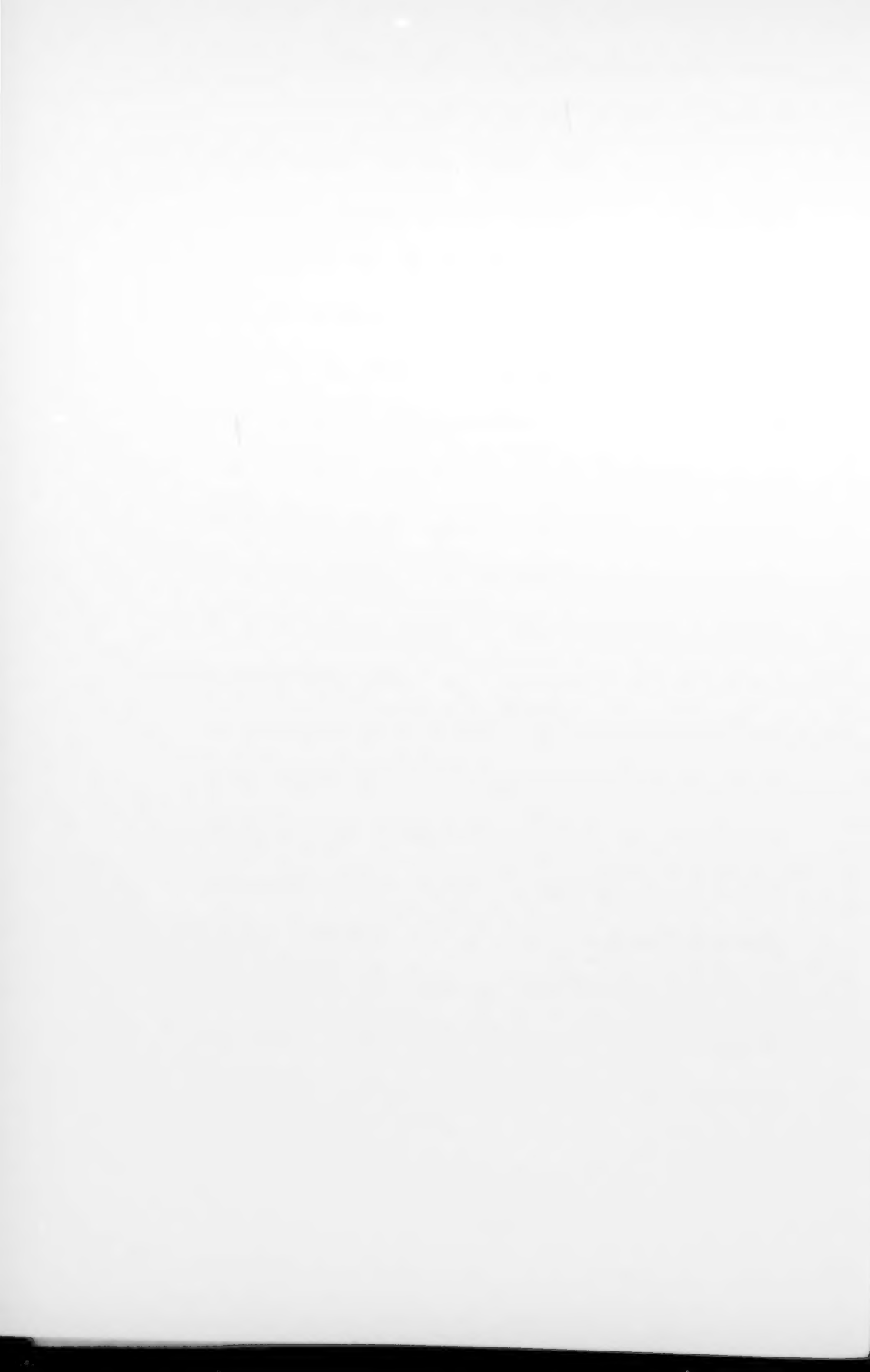
line of marchers to hold a demonstration and religious service on the steps of St. Patrick's Cathedral on the east side of Fifth Avenue between Fiftieth and Fifty-First Streets. The demonstrations were designed to convey to the passing marchers the message that homosexuals can be and frequently are practicing Catholics, and to protest the Roman Catholic Church's anti-gay position. Defendants do not dispute that Dignity, its purposes, and its activities, including its demonstrations in front of St. Patrick's, are totally peaceful and non-violent.

In 1981, two anti-gay demonstrators purporting to represent the Catholic War Veterans attacked some of the marchers and were arrested for disorderly conduct. No other violent incidents have been associated with Dignity's demonstrations. Despite this incident, Dignity was permitted to hold its



usual demonstration on the steps of St. Patrick's during the 1982 March.

Prior to the 1983 March, defendants determined to close off access to the sidewalk and steps in front of St. Patrick's, which are normally open to the public during other parades, because of threats of violence made by anti-gay demonstrators who had unsuccessfully sued to enjoin the entire March. Despite predictions that thousands of anti-gay demonstrators would appear between 50 and 100 actually attended and there was no violence. In 1984, defendants again determined to "freeze" the sidewalk in front of the Cathedral to avoid what they perceived to be the potential for conflict between Dignity and the anti-gay demonstrators. A last minute First Amendment challenge to this restriction was dismissed by Judge Duffy of this court on grounds of laches. Once again, in 1984,

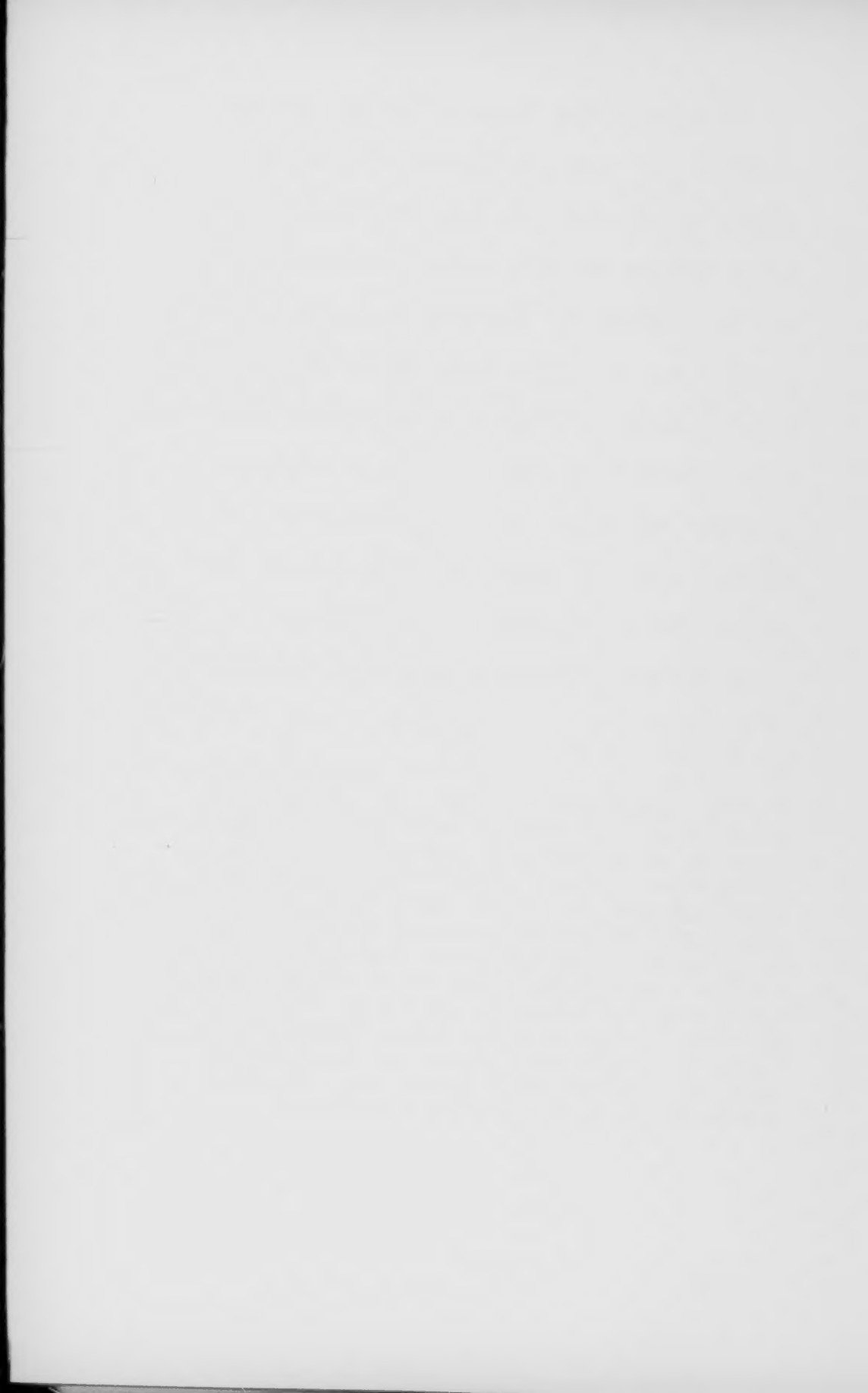


only about 100 anti-gay demonstrators appeared and no violence was reported. Two representatives of Dignity were permitted briefly onto the sidewalk in front of the Cathedral to lay a wreath.

In anticipation of this year's March, plaintiffs early on requested access to the sidewalk for a demonstration by their entire group of 200, arguing that the location in front of the Cathedral is crucial to conveying their message that gay people should be accepted as mainstream Catholics. The official organizers of the March, who hold a permit to occupy Fifth Avenue, have endorsed the proposed Dignity protest and have issued a resolution urging that Dignity be permitted access to the sidewalk as in the past.

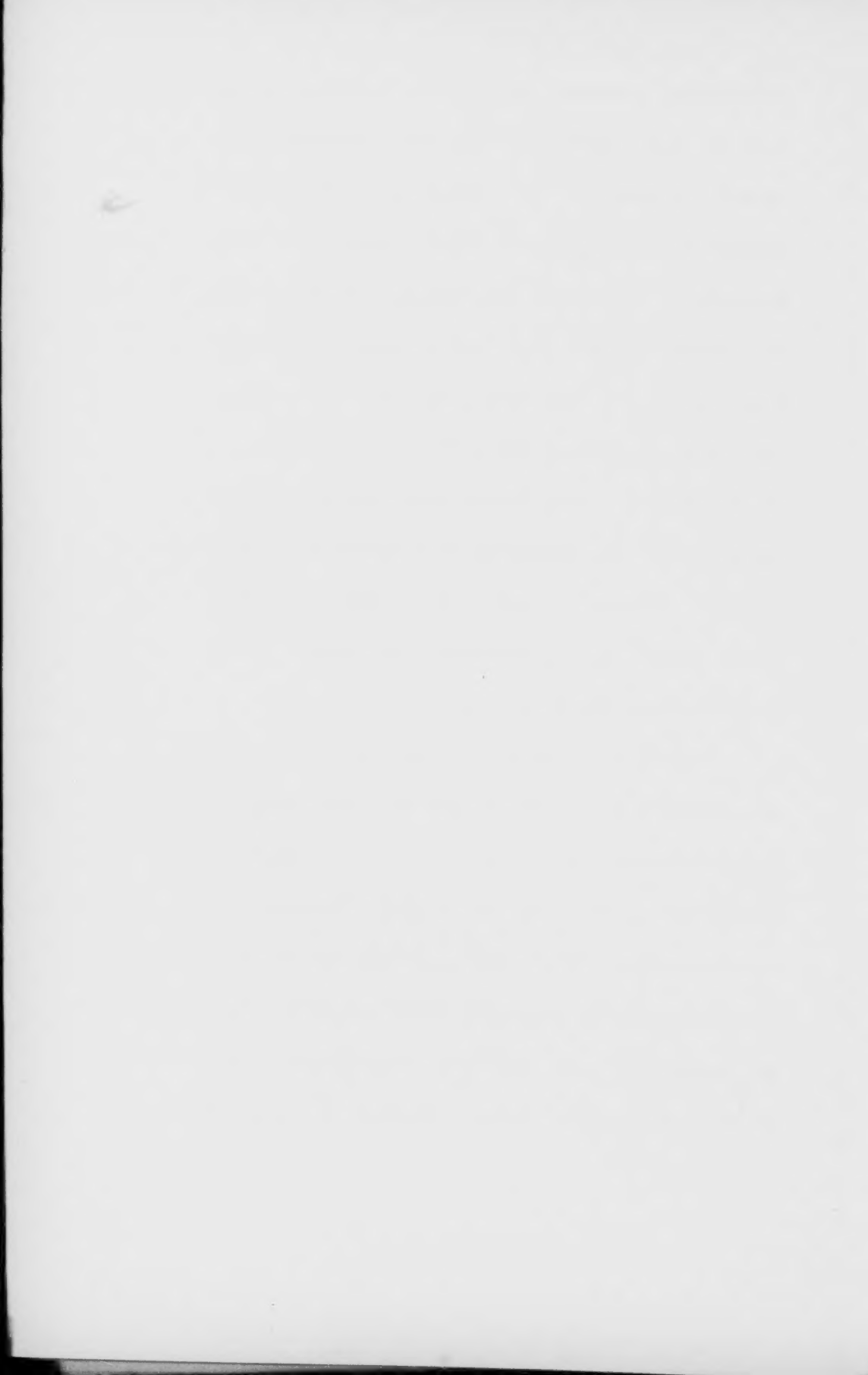
Following the demand of an ad-hoc committee of anti-gay activists¹ for equal access to the sidewalk, however, defendants again decided to deny access to all groups and to establish demonstration areas for each group, out of sight and sound of each other, across Fifth Avenue on Fiftieth and Fifty-First Streets. Defendants, in addition, propose to allow "a limited number" of Dignity members again to hold a ten to fifteen minute wreath-laying ceremony in front of the Cathedral when the Dignity

¹ The committee appears to consist of members of the Catholic War Veterans, the Knights of Columbus, and other groups. Defendants report that the anti-gay demonstrators, as they have for several years, are predicting increased attendance at their counter-demonstration this year. In addition, the police anticipate a disturbance by a group of Orthodox Jews from Brooklyn on Fifth Avenue between Forty-Seventh and Forty-Ninth Streets. There is no evidence that this action will focus on Dignity's demonstration or St. Patrick's Cathedral.



contingent passes by. The parade would halt at this point, so that the demonstration would primarily be observed by other members of Dignity. Since this plan was formulated by Police Department officials and no formal appeal had been made to Mayor Koch prior to the bringing of this action, the court required plaintiffs to appeal first to the Mayor. The Mayor has now stated his support for the Department's handling of the instant dispute. Exh. A. Since neither party called any witnesses, the court called Commissioner Ward as a witness.

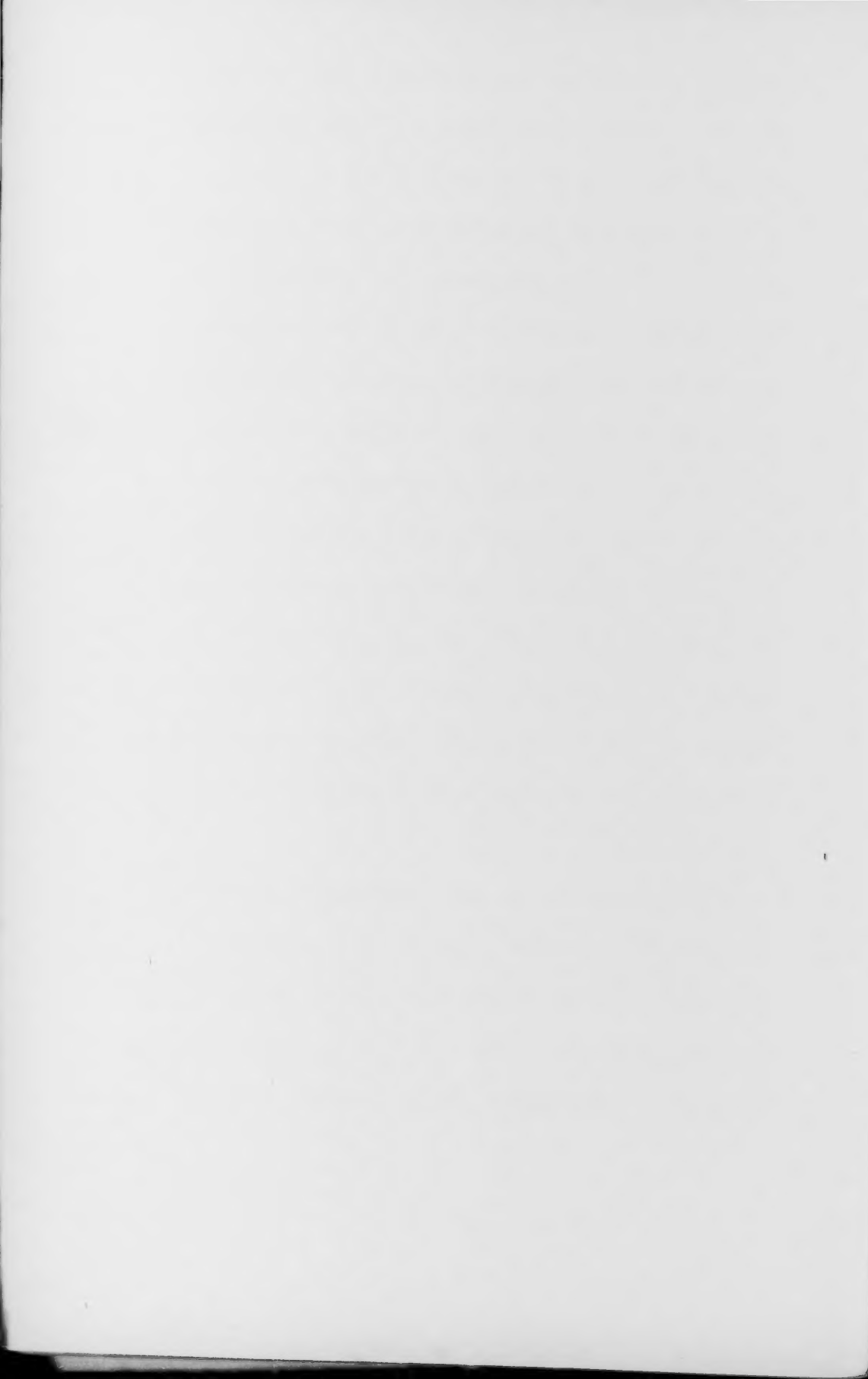
Plaintiffs have proposed several alternatives to the total ban on more lengthy demonstrations in front of the Cathedral, including permitting a limited number of demonstrators from each group to occupy each end of the sidewalk with a buffer zone in between. As another alternative, the March organizers have agreed to permit



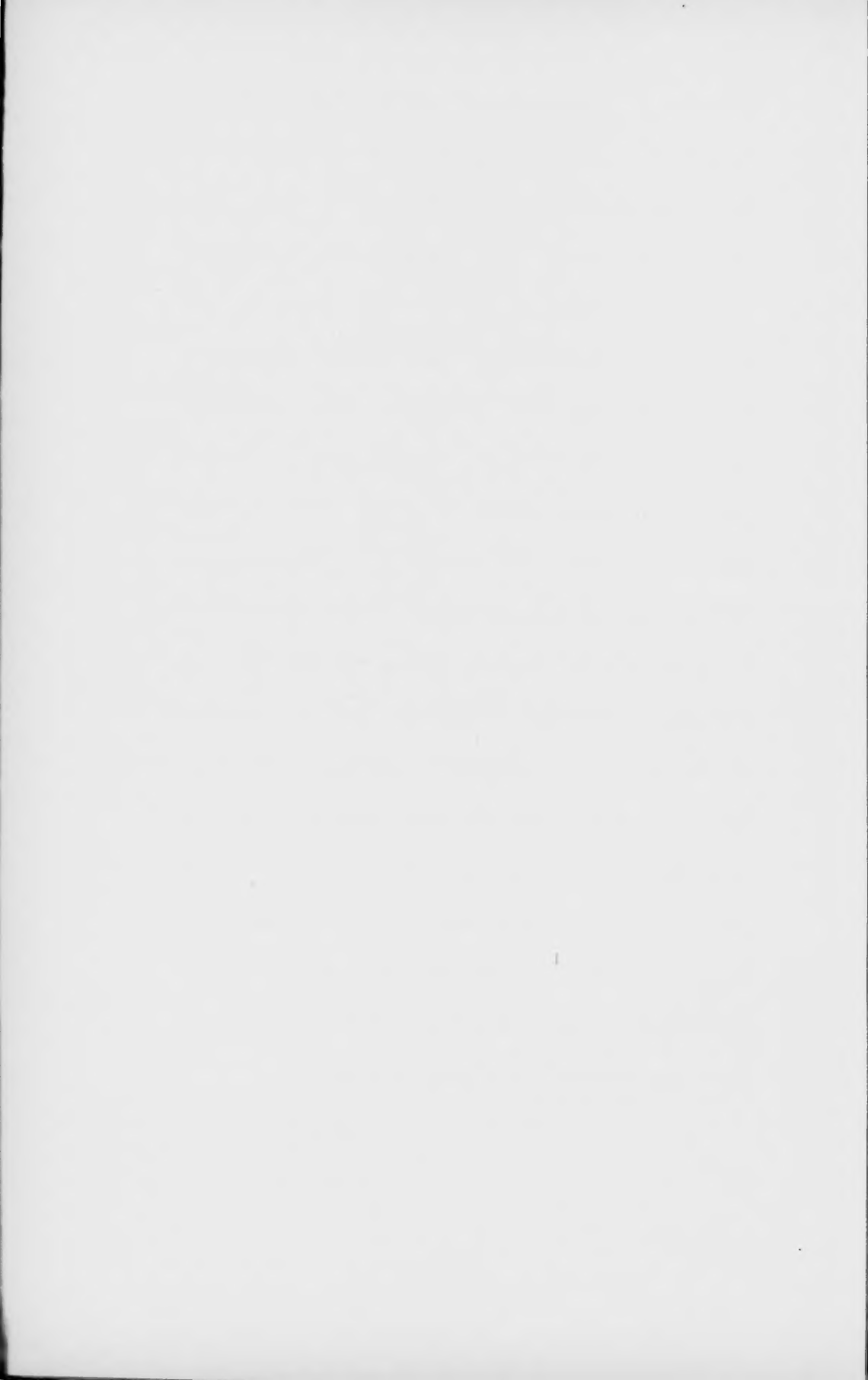
Dignity to hold its demonstration and service in the eastern-most lane of Fifth Avenue directly in front of St. Patrick's.

Defendants, nevertheless, have rejected any plan that provides for Dignity to maintain a presence in front of St. Patrick's throughout the parade as plaintiffs demand. Defendants instead have counter-offered to move the controlled demonstration areas across Fifth Avenue onto Fiftieth and Fifty-First Streets around the corner from St. Patrick's but still out of sight of each other. Plaintiffs reject this proposal because, like defendants' original plan, it puts them out of sight and sound of many of the marchers.

In response to the court's suggestion that both groups could be permitted controlled access to the sidewalk in severely limited numbers with a buffer zone in between, defendants have raised several



objections. Defendants insist that mutually hostile gay and anti-gay demonstrators must be separated, preferably by a full city block, to avoid the danger of violence. Defendants further argue that even if the groups are sufficiently limited and separated to avoid violence between the sidewalk demonstrators, the potentially violent anti-gay demonstrators must be isolated from the main line of marchers. Defendants' counsel states that it is the City's policy not to allow hostile demonstrators to occupy the sidewalk directly adjacent to a parade possessing an official permit. Counsel further states that in past years, anti-gay demonstrators have jeered and spat upon participants in the March, and that the organizers of the 1985 March therefore have requested that counter-demonstrators be kept back from the line of marchers.



Defendants also argue that allowing Dignity alone to occupy the sidewalk would be an impermissible content-based restriction because it would deprive the anti-gay groups of their preferred symbolic backdrop. Defendants nevertheless report that the anti-gay groups have made no objection to defendant's plan to isolate the sidewalk and further concede that in keeping Dignity from demonstrating in front of the Cathedral, the anti-gay groups apparently would achieve exactly what they wanted.

CONCLUSIONS OF LAW:

In order to obtain a preliminary injunction, plaintiffs must demonstrate irreparable harm and either a likelihood of success on the merits or substantial questions going to the merits coupled with a balance of hardships tilting in their favor. Mitchell v. Cuomo, 748 f.2d 804, 806 (2d



Cir. 1984); Sierra Club v. Hennessy, 695 F.2d 643, 647 (2d Cir. 1982). The loss of First Amendment rights itself constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L.Ed.2d 547 (1976); 414 Theater Corp. v. Murphy, 499 F.2d 1155, 1160 (2d Cir. 1974). Absent preliminary injunction, any injury to plaintiffs' First Amendment rights in this case would become irreparable on June 30, the date of this year's "Gay Pride March." Therefore, the question before the court is whether plaintiffs can demonstrate a likelihood of success on the merits of their First Amendment claim, or at least serious questions on the merits and a balance of hardships tilting in their favor.

The public sidewalks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating



thoughts between citizens, and discussing public questions." Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.). When a publicly owned place has been made generally available to the public for expressive activities, as the sidewalk along Fifth Avenue undeniably has, it will be considered, without more, to be a public forum. United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983). See also Concerned Jewish Youth v. McGuire, 621 F.2d 471, 473 (2d Cir.1980).

Government's ability to limit speech in a public forum, absent a compelling state interest of a kind not argued for by defendants here, is "very limited." Grace, 461 U.S. at 177, 103 S.Ct. at 1707. "[T]he government may enforce reasonable time,

place, and manner regulations as long as the restrictions are 'content-neutral, are narrowly tailored to serve a significant government interest, and leave open amply alternative channels of communication.'" Id. (citations omitted). See also Clark v. Community for Creative Non-Violence, — U.S. —, —, 104 S. Ct. 3065, 3069, 82 L.Ed.2d 221, 227, (1984). The court, in evaluating defendants' claim that the restriction on Dignity's demonstration is a constitutional time, place, and manner regulation, will address each of these requirements in turn.

Content-Neutrality

Defendants argue that their plan to move both Dignity and the anti-gay protesters to demonstration areas away from the front of St. Patrick's Cathedral is content-neutral because it favors neither



side of the dispute but merely bans all speech on the sidewalk in the interest of public order. In fact, there is no evidence that defendants seek to silence plaintiffs' message. Nevertheless, it is undeniable that the sidewalk in front of St. Patrick's has been made available to other demonstrators and parade participants in the past, and that both plaintiffs and their opponents are being removed because their speech is controversial and though likely to cause a disturbance. The Supreme Court has held that restrictions on particular subjects of speech, in addition to limitations aimed at the viewpoint of individual speakers, may render invalid an attempted time, place and manner regulation. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject manner or its content." Police Department v. Mosley,



408 U.S. 92, 95, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972) (ban on picketing on certain subjects near school unconstitutional) (emphasis added). Accord Consolidated Edison Company of New York, Inc. v. Public Serv. Comm'n, 447 U.S. 530, 536-38, 100 S.Ct. 2326, 2332-34, 65 L.Ed.2d 319 (1980) (ban on bill inserts advocating either side of nuclear energy debate unconstitutional).

Subject matter restrictions have been approved as reasonable time, place, or manner regulations only when the setting of the speech raises special governmental concerns. See e.g., Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (security on military base); Lehman v. Shaker Heights, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (captive audience on city transit system). "Greer and Lehman properly are viewed as narrow exceptions to the general prohibition against



subject matter distinctions." Consolidated Edison 447 U.S. at 539, 100 S.Ct. at 2334. No such exception applies here, where the forum traditionally has been open to all speakers and presents no special security problems such as are associated with military bases.

Therefore, defendants' attempt to ban all speech from the front of St. Patrick's Cathedral only on the day when the dominant subject matter will be gay rights is suspect as a subject matter distinction. Defendants nevertheless insist that since they seek not to suppress discussion on the subject but merely to move it across the street because of its alleged threat to public order, their plan passes the content-neutrality requirement. Even assuming, arguendo, that defendants' actions are content-neutral, the regulation still cannot pass muster under



the other prongs of the time, place, and manner test.

Important Governmental Interest

Defendants correctly assert that maintaining public order is an important governmental interest. When it seeks to justify curtailments on speech, however, government must do more than invoke "public order" in a general sense; it must show that there is a significant basis in fact for its prediction of disorder. Defendants "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Mosley, 408 U.S. at 101, 92 S.Ct. at 2293 (quoting Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969)). On the undisputed facts before the court, it does not seem that defendants had



much more than a speculative fear of unrest when they decided to close off the sidewalk in front of St. Patrick's Cathedral. The seven year experience of plaintiffs' full-scale demonstrations provides defendants with an unusually detailed and consistent factual record to serve as a basis for prediction. Although there was a minor scuffle caused by anti-gay activists in 1981, plaintiffs held their usual demonstration in front of the Cathedral in 1982 without incident--belying defendants' assertion that it is only the "freezing" of the sidewalk in 1983 and 1984 which has maintained order. Other than the 1981 incident, and despite veiled threats and annual predictions of mass demonstrations by anti-gay groups, there has been no other violence and no more than 100 demonstrators have ever appeared in opposition to Dignity. There is no rational basis for assuming that this year will be any different, or that



anti-gay demonstrators will appear in front of the Cathedral in such numbers as would cause a major threat to public safety.

Moreover, that plaintiffs' speech concerns controversial issues which arose popular passions is, if anything, an argument for affording Dignity's demonstration extra protection. It is precisely when speech in the public forum is provocative, challenging, and hotly contested that the core values of the First Amendment concerning the free exchange of ideas are most directly implicated--and that the state's duty to protect the speaker's right to speak is most pointedly called into play. As Justice Douglas wrote for the Supreme Court,

a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a

condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to a standardization of ideas either by legislatures, courts, or dominant political or community groups.



Terminiello v. Chicago, 337 U.S. 1, 4-5, 69 S.Ct. 894, 895-96, 93 L.Ed. 1131 (1949). See also Bachellar v. Maryland, 397 U.S. 564, 567, 570-71, 90 S.Ct. 1312, 1314, 1315-16, 25 L.Ed.2d 570 (1970); Cox v. Louisiana, 379 U.S. 536, 551-52, 85 S.Ct. 453, 462-63, 13 L.Ed.2d 471 (1965).

The case at bar does not concern complete suppression of speech, and therefore is not controlled by the "clear and present danger" standard or its modern equivalent. See Brandenburg v. Ohio, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 1829-30, 23 L.Ed.2d 430 (1969) (per curiam). Nevertheless, the underlying values of Terminiello and its progeny compel the court to examine closely any assertion by the government that peaceful speech by peaceful demonstrators on a controversial public issue in a classic public forum must be curtailed even by a time, place, and manner



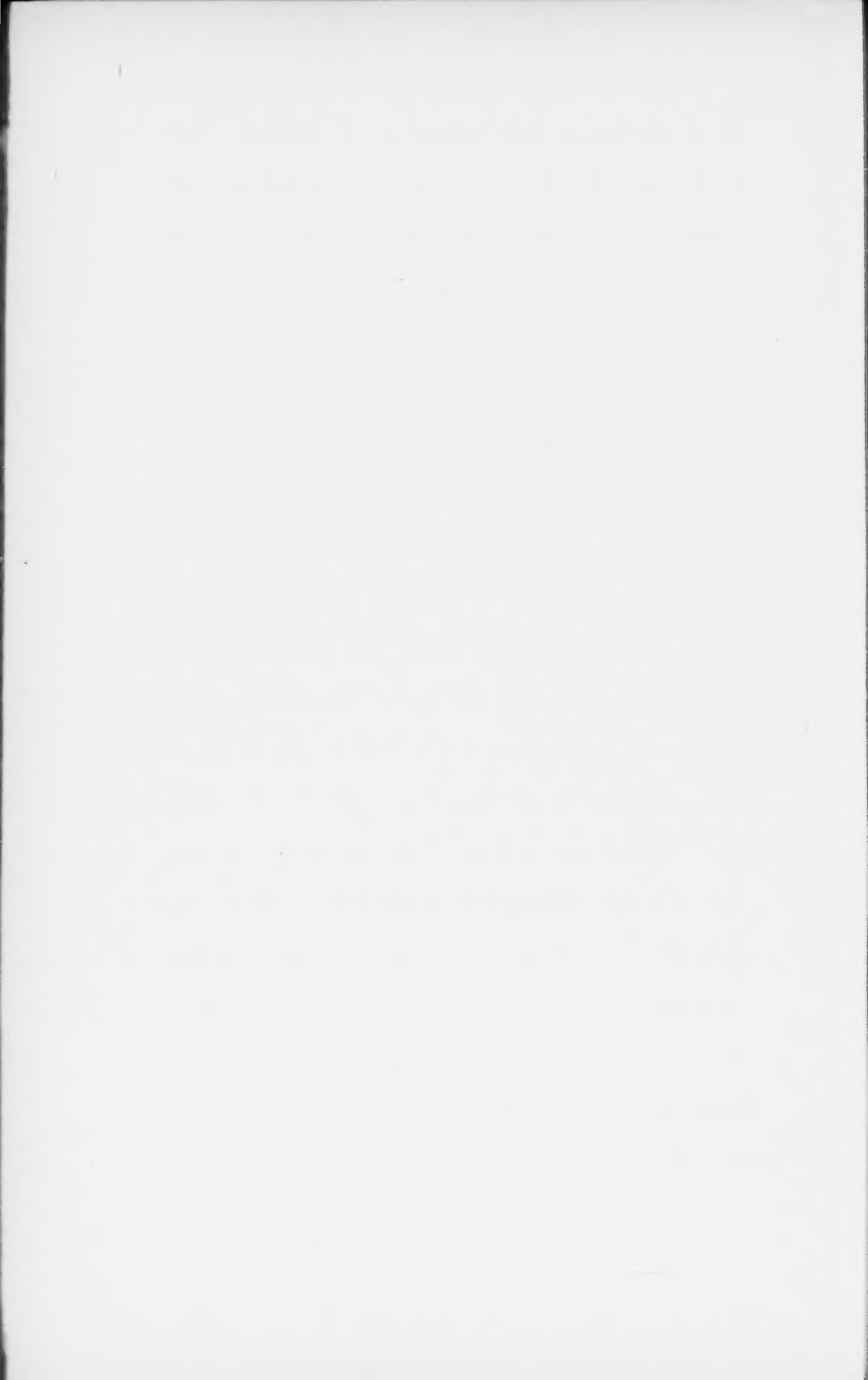
restriction because of the hostile, angry reaction of others. Our system favors what Justice Fortas described as a "hazardous freedom". Tinker, 393 U.S. at 508, 89 S.Ct. at 737, which preserves the public forum for controversial speakers and does not permit anticipation of a hostile reaction to dictate when and where speech will be allowed.

In view of plaintiffs' long history of peaceful demonstrations and the absence of a significant factual basis for a heightened expectation of violence this year, the court finds that the "important state interest" alleged in this case is comparatively weak. In reaching this conclusion, the court stresses that this is not a case where the setting of the speech implicates special government concerns. Fifth Avenue is not a military base, see Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976),

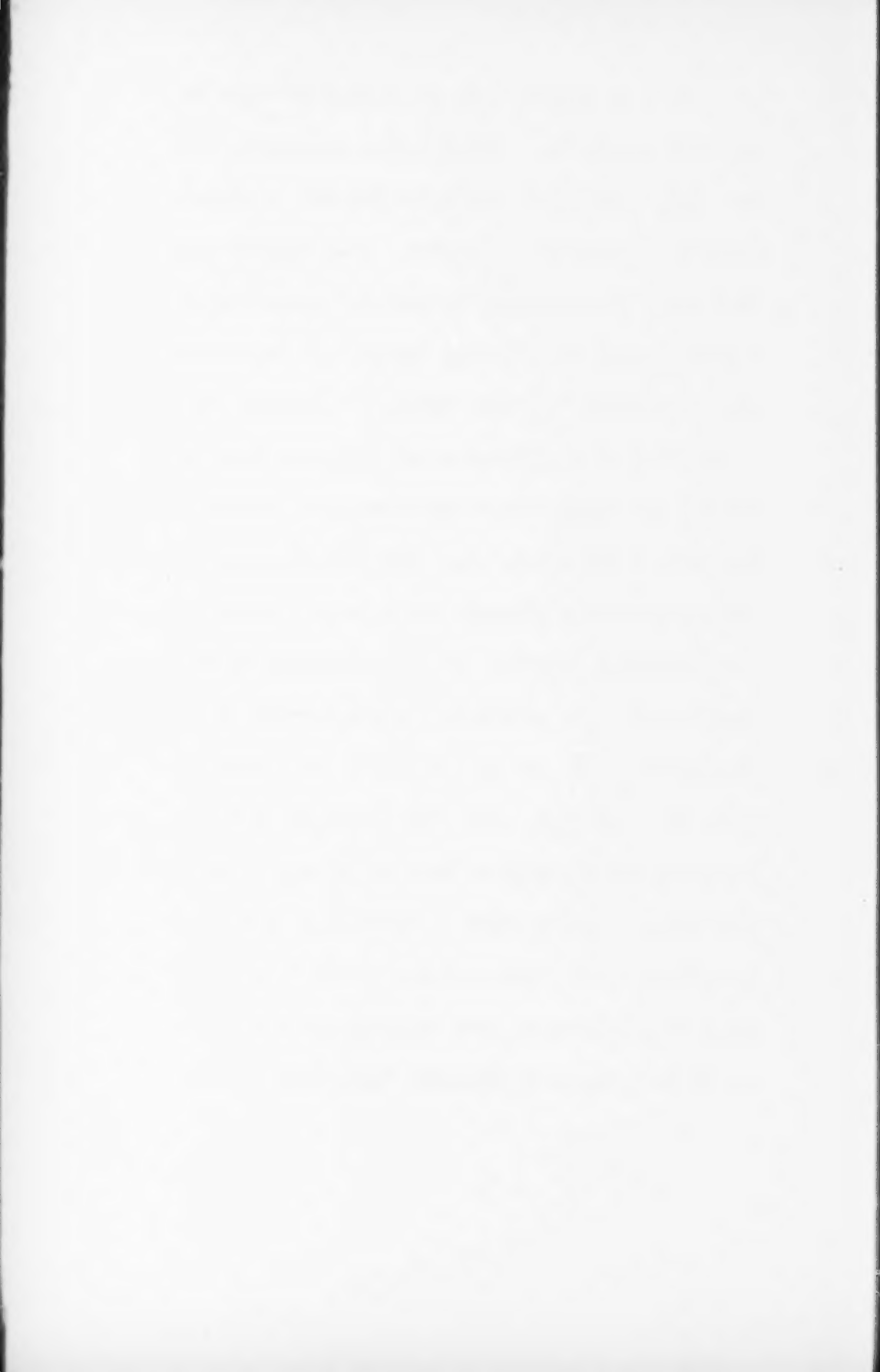


or a jailhouse, see Adderley v. Florida, 385 U.S. 39, 87 S. Ct. 242, 17 L.Ed.2d 149 (1966), where extra security precautions are necessary. It is a major commercial thoroughfare and as such is the classic public forum.

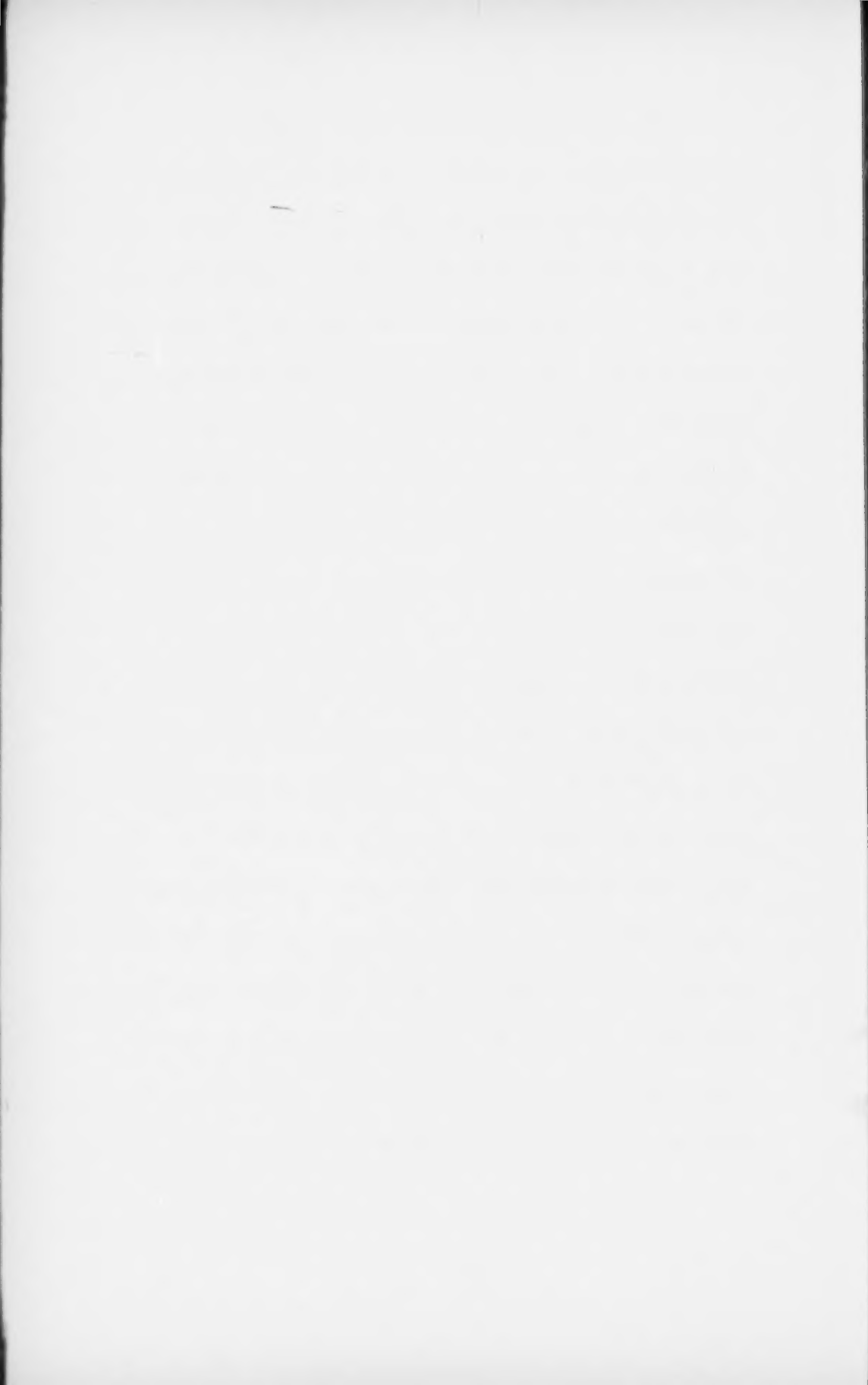
Defendants rely on Concerned Jewish Youth v. McGuire 621 F.2d 471 (2d Cir. 1980)(CJY), as support for the importance of their asserted governmental interest. In CJY, a divided Second Circuit panel upheld a ban on picketing in front of the Russian Mission in New York City and a requirement that demonstrators be confined to a "bull pen" diagonally across the street. *Id.* at 472. Judge Mansfield dissented, calling the restriction "unlawful overkill and prior restraint of appellants' exercise of their First Amendment right to picket and demonstrate in a peaceful and orderly manner." Id. at 478.



In any event, CJY is distinguishable on several grounds. First, the demonstrators in CJY included militant Jewish Defense League members. Second, the restriction was made in response to several instances of violence and an ongoing danger of terrorism and vandalism at the Mission. Third, the protection of the Russian Mission was deemed to be of heightened governmental concern because it implicated our delicate relationship with a powerful foreign adversary. Fourth, the Mission's location on a residential street implicated the privacy interests of local residents. Id. at 472-75. In the case at bar, by contrast, plaintiffs are an entirely peaceful group with a history of non-violent demonstrations, and neither potential terrorism nor international relations nor residential privacy are significant concerns on Fifth Avenue in Midtown Manhattan.



On facts analogous to CJY, in International Society for Krishna Consciousness, Inc. v. City of New York, 484 F.Supp. 966 (S.D.N.Y. 1979) (ISKCON) (Motely, J.), this court ruled that the Police Department was justified in prohibiting plaintiff religious society from practicing Sankirtan, a ritual which includes proselytizing and soliciting funds, on sidewalks immediately adjacent to the visitors' gate at United Nations headquarters. Id. at 967-68. Again, the general state interest in maintaining order was bolstered by a factually grounded concern over terrorism and the government's particular interest in maintaining traffic flow and protecting the safety and convenience of United Nations visitors, some of whom had complained about the disruptive nature of plaintiffs' activities. Moreover, the ban applied to all First Amendment activities and



did not single out one particularly controversial topic for regulation. Id. at 968-70.

In both ISKCON and CJY, the City had a significant, content-neutral reason to keep all demonstrators away from a particular site, in addition to substantial concerns about the actual activities of the respective plaintiffs. By contrast, in this case, the government's interests are based on speculation regarding disruption by third parties and there is no reason for heightened concern about terrorism or international embarrassment. In short, the state interests asserted in this case simply are not of the same magnitude as those implicated in CJY or ISKCON.

Narrowly Tailored Regulation

Even assuming, again arguendo, that defendants are able to show that sufficiently

important government interests are implicated by the facts of this case, defendants must still demonstrate that the asserted time, place, and manner regulation is narrowly tailored to serve those interests. United States v. Grace, 461 U.S. 171, 177-78, 181, 103 S.Ct. 1702, 1707-08, 1709, 75 L.Ed.2d 736 (1983). Once again, defendants' case is problematic on the facts presented. Despite plaintiffs' willingness to work with defendants on a compromise that would preserve plaintiffs' access to their preferred forum, the Police Department has rejected all suggested alternatives. While it is true, as defendants' counsel asserts, that the City is under no duty to consider every possible plan put forth by plaintiffs, the existence of a feasible and significantly less restrictive alternative would cast doubt on defendants' assertion that the "freezing" of the sidewalk



is a narrowly tailored method of maintaining public order.

One of plaintiff's suggestions--that Dignity and the anti-gay demonstrators each be permitted to occupy a portion of the sidewalk in front of the Cathedral with a buffer zone in between--was also proposed by the court as a possible compromise at the hearing on the instant motion. The suggestion was rejected by defendants because it did not adequately separate the Dignity contingent from the potentially disruptive anti-gay demonstrators and, more importantly according to defendants' counsel, because it meant that the anti-gay group would be located directly adjacent to the passing parade. Counsel explained that this would violate the city's policy of keeping potentially disruptive antagonistic demonstrators at a reasonable distance from parades that possess official permits, and



would create a danger of harassment and spitting incidents which the parade organizers had requested by prevented. Since the anti-gay demonstrators therefore must be removed from the sidewalk directly adjacent to the parade, defendants' counsel argues that content-neutrality requires that Dignity also be banned from the block.

Defendants make a facially appealing argument: Since both groups seek to avail themselves of the symbolic backdrop of St. Patrick's Cathedral, it is not for the state to decide that only one group may have that access. It is true, of course, that two objects can not occupy the same place at the same time. Thus, when two competing groups seek a street permit to parade on the same day, the City, of necessity, must choose between them, either on a first-come-first-served basis or by some other content-neutral method. The public

sidewalk, however, is not assigned through a permit procedure; it is a traditional public forum which the City has generally left open for anyone who wishes to use it. In the absence of some formalized procedure for assigning sidewalks to particular groups, plaintiffs' argument that they should get priority because they asked first for access to the sidewalk is without merit. To hold otherwise would be to invite the chaos of various groups scrambling to lock up particular public forums months or years in advance.

On closer reflection, however, the court is not persuaded by defendants' content-neutrality argument. The issue is not whether, given the specific facts of this case, there is justification for granting a preference to plaintiffs in the use of the forum. The question is whether there is a content-neutral reason to deny access for



either or both groups to a public forum that is otherwise open to everyone. If the court correctly understands the City's policy, even if Dignity did not propose to demonstrate on the sidewalk in front of the Cathedral, the potentially disruptive anti-gay demonstrators would not be permitted near the parade on Fifth Avenue. Once this group, which has a history of harassing and attacking pro-gay demonstrators, is removed, so is the potential for any conflict with Dignity demonstrators. The accompanying state interest in maintaining order would thereby be satisfied in full, since there is not reason to expect conflict between plaintiffs and the rest of the marchers, whose organizers support the Dignity demonstration. Assuming that it is enforced in a content-neutral way, the City's policy of keeping hostile demonstrators away from officially sanctioned parades therefore

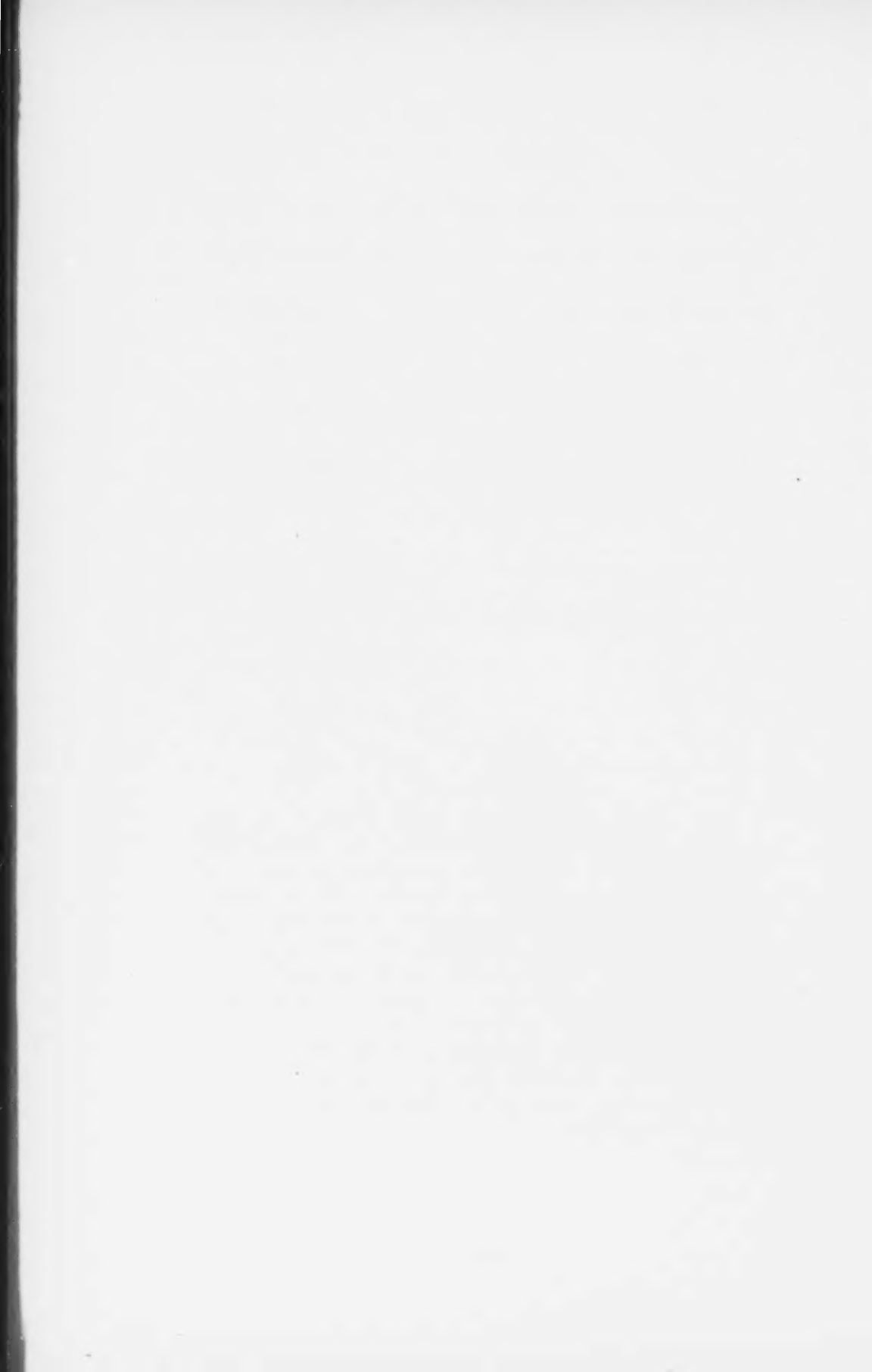
provides a substantially less restrictive way to maintain order on Fifth Avenue during the Gay Pride March: Simply keep the anti-gay demonstrators at a reasonable distance from the parade and otherwise leave the public forum undisturbed.

Once again, the facts of this case distinguish it from CJY and ISKCON, in which the activities of plaintiffs themselves created disturbances and presented a potential threat to public order and safety. Here, plaintiffs propose merely to continue their tradition of peaceful demonstrations. There has been no assertion by defendants of any overriding need to keep the sidewalk in front of St. Patrick's clear of demonstrators as a general matter, or to keep friendly demonstrators away from the site of a parade possessing a City permit. Therefore, if the City's policy of keeping hostile demonstrators away from recognized

parades removes the anti-gay group from the Cathedral sidewalk to a controlled demonstration area set back from Fifth Avenue, the further removal of Dignity from an otherwise open public forum serves no additional state purpose.²

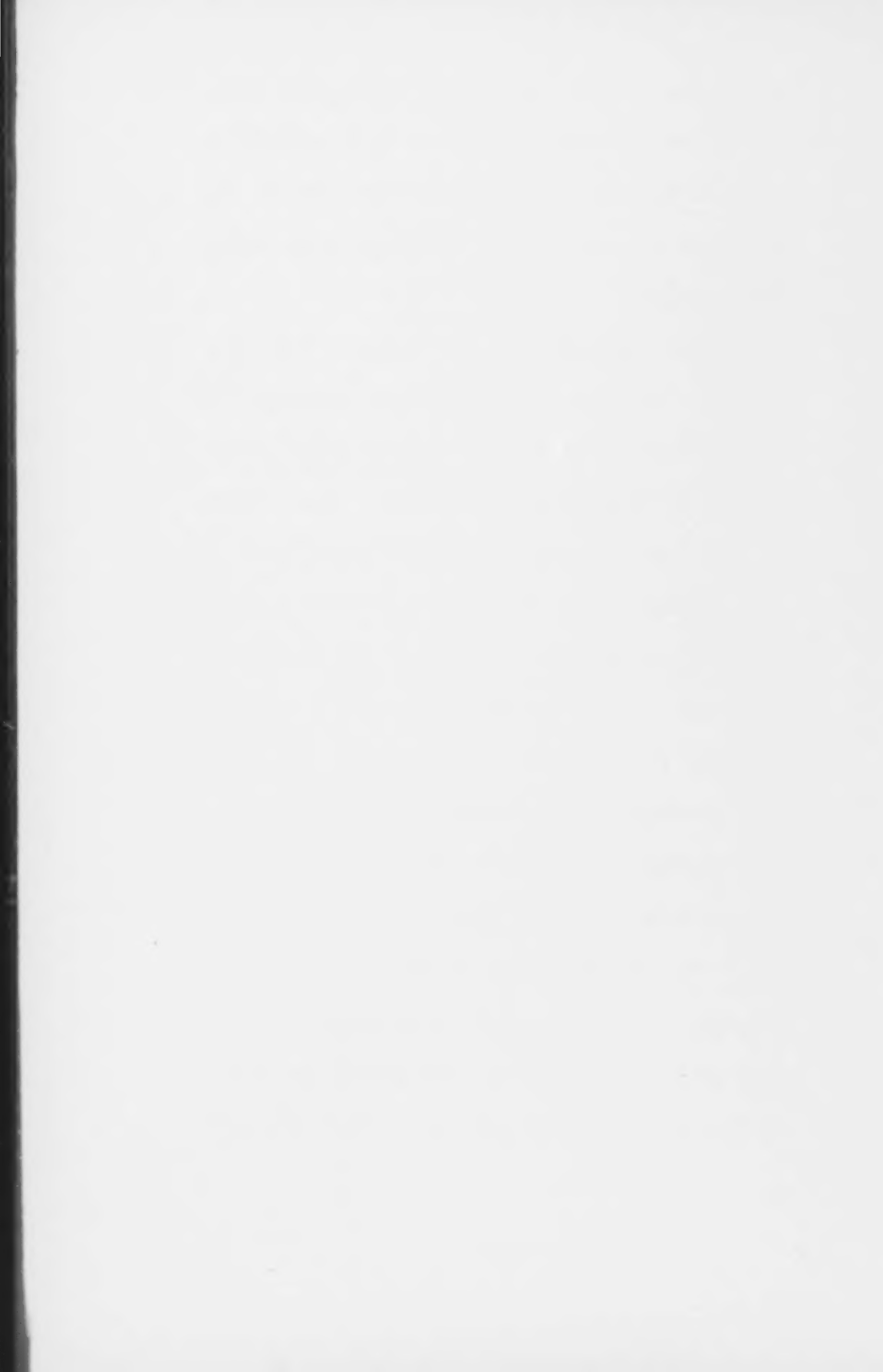
The court does not believe, despite the able and articulate advocacy of defendants' counsel, that permitting Dignity to hold its demonstration in front of the Cathedral while removing the anti-gay demonstrators would amount to an impermissible content-based

² The court does not have before it the question whether the record of disruption caused by anti-gay demonstrators is sufficient to provide a basis for a time, place, and manner restriction removing them from the sidewalk adjacent to the parade. If, however, defendants lack a sufficient basis to enforce their otherwise content-neutral policy of preventing interference with parades, they would also seem to lack a basis for predicting violence between the anti-gay demonstrators and Dignity members.



distinction. The policy of protecting from disruption parades possessing City permits is content-neutral and presumably would be enforced no matter what messages were being disseminated.

For example, let us assume that the Catholic War Veterans and other like-minded groups were to obtain an official City permit to hold a "Family Values Parade" down Fifth Avenue on a certain Sunday and that a sympathetic group of Roman Catholics sought to hold a prayer vigil on the adjacent sidewalk. If, under this scenario, a militant pro-gay group, with a history of attacking and spitting on "pro-family" marchers, were to announce its intention to hold a demonstration on the same spot at the same time, the City would no doubt be justified in keeping them behind barricades at a reasonable distance from the parade in order to prevent interference with the officially



recognized event of the day. This would be noting more than a reasonable time, place, and manner regulation. There would be not reason, on these facts, also to prevent the prayer group from availing itself of its preferred public forum.

In the final analysis, under this more narrowly tailored approach, defendants would not be "giving" the forum to one group over another. They would merely be declining to interfere with speech in a traditional public forum except where the potential for disruption of a City-recognized parade requires that hostile demonstrators be kept at a reasonable distance.

This conclusion is bolstered by plaintiffs' undisputed observation that the primary agenda of the anti-gay demonstrators is to prevent plaintiff's speech. To remove Dignity from its preferred public forum because of fear of



disruption by its opponents would be, as plaintiffs have suggested, to provide a blueprint for a modified heckler's veto: Any group seeking to keep another group from using a particularly evocative public forum need only threaten to appear with a sufficiently large, disruptive group of counterdemonstrators and the entire area will be "frozen."

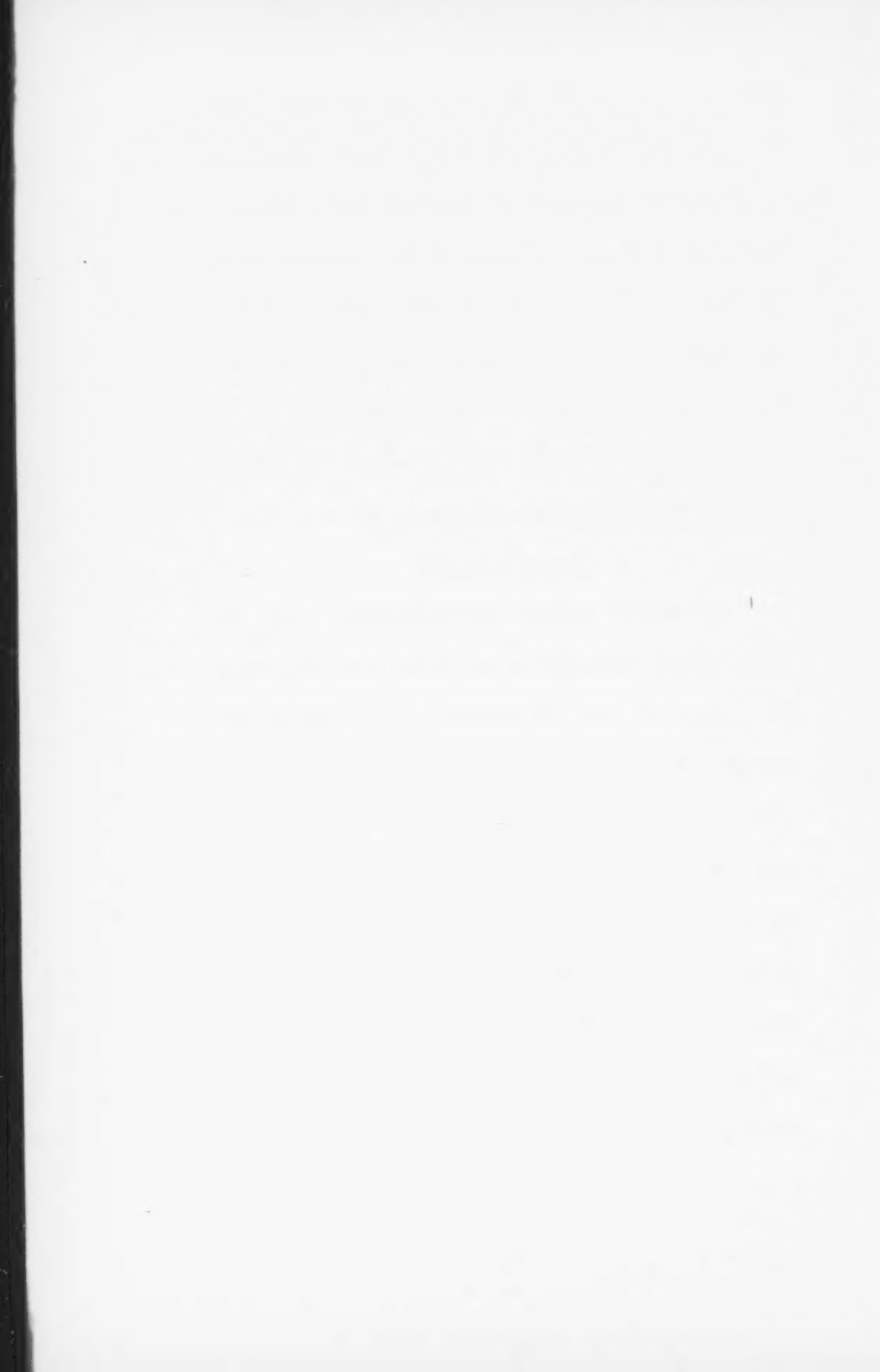
Another factual setting might present more troubling dilemmas for public officials seeking to remain content-neutral while balancing First Amendment rights against the need to maintain order. On the facts before the court, however, it is apparent that the evil to be prevented is the violent disruption of both Dignity's peaceful demonstration and the entire "Gay Pride March." Despite defendants' repeated reference to preventing violence between two "mutally hostile" groups, it is the anti-gay demonstrators and



not Dignity's members who present the threat of violence. In that context, defendants' decision to prevent both Dignity and the anti-gay groups from demonstrating in front of St. Patrick's Cathedral is not a narrowly tailored means of serving the legitimate governmental ends at stake.

Alternative Channels of Communication

Plaintiffs argue persuasively that to move their demonstration from the sidewalk in front of St. Patrick's to a sidestreet around the corner is to interfere seriously with their symbolic message, which is that gay people should be accepted as mainstream Catholics, and not shunted aside or reluctantly tolerated. The brief ten-minute demonstration directly in front of the Cathedral which defendants propose to allow, during which the parade would stop with the



Dignity contingent in front of the Church and a "limited number" of members would be permitted on the sidewalk to lay a wreath, would not permit plaintiffs to convey their message to the entire passing parade of gays and their supporters. They would, as it were, merely be preaching to the converted.

In any event, in the absence of a content-neutral regulation that is narrowly tailored to serve important governmental interests, the existence of adequate alternative channels of communication cannot justify a restriction on First Amendment rights. "[T]he streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercise in some other place." Schneider v. State, 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155

(1939). Accord Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975). See also United States v. Grace, 461 U.S. 171, 180-81, 103 S.Ct. 1702, 1708-09, 75 L.Ed.2d 736 (1983).

CONCLUSION:

On the facts before it, the court concludes that plaintiffs have shown a likelihood of success on the merits of their First Amendment claim. Defendants have failed to persuade the court that their plan to "freeze" the sidewalk in front of St. Patrick's Cathedral during the "Gay Pride March" is content-neutral, that sufficiently important governmental interests are implicated by the facts of this case, that a more narrowly tailored alternative would not adequately serve whatever state interests are implicated, or that adequate alternative

channels of communication are left open by defendants' proposed regulation. Defendants' predictions of violence are largely speculative and, to the extent that these predictions are factually grounded, are based on the likelihood of violent disruption by anti-gay demonstrators. As indicated above, defendants have content-neutral policies to maintain public order without interfering with the rights of peaceful groups to use the public forum. The limitations imposed on the public forum by defendants therefore are unreasonable both in terms of the numbers of demonstrators to be allowed on the sidewalk and the duration of time that they will be permitted to occupy the forum.

Since plaintiffs have demonstrated a likelihood of success on the merits, and since the alleged harm to plaintiffs' First Amendment rights would occur on June 30,



the date of this year's March, plaintiffs also have made the requisite showing of irreparable harm. Plaintiffs therefore would be entitled to a preliminary injunction preventing defendants from denying them reasonable access to the sidewalk in front of St. Patrick's Cathedral during the March.

Defendants will not be prohibited from taking appropriate action, through the use of barricades and the deployment of officers, to maintain order and safety on Fifth Avenue during the parade. The court is confident that the Police Department, with its vast experience in crowd control at New York parades and demonstrations, can fashion a means of maintaining the public peace without denying plaintiffs access to their preferred public forum. It is not the role of the court to dictate the details of this peacekeeping effort. The court must intervene only when the police, faced with

an admittedly difficult, discretionary task, overshoot their authority to regulate First Amendment activity. Such is the case here and, absent a more reasonable plan, plaintiffs will be entitled to preliminary injunctive relief.

In view of the Commissioner's expressed willingness to compromise and work with plaintiffs on a more reasonable plan, defendants are granted an additional 96 hours to formulate a plan that will permit a reasonable number of Dignity members to hold a peaceful demonstration on the sidewalk in front of St. Patrick's Cathedral for a reasonable period of time. This plan will be presented to the court at 5:30 p.m. on Monday, June 17, 1985 in Courtroom 506.

FILED

JAN 30 1987

JOSEPH F. SPANIOL, JR.
CLERK

No. 86-989

4

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as Police Commissioner of the City of New York, EDWARD I. KOCH, in his official capacity as Mayor of the City of New York, and THE NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

—against—

MICHAEL J. OLIVIERI, *et al.*,

Respondents.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STUART WALTER GOLD

Counsel of Record

RONALD K. CHEN

JENNIFER J. RAAB

One Chase Manhattan Plaza

New York, New York 10005

(212) 422-3000

Attorneys for Respondents

CRAVATH, SWAINE & MOORE

One Chase Manhattan Plaza

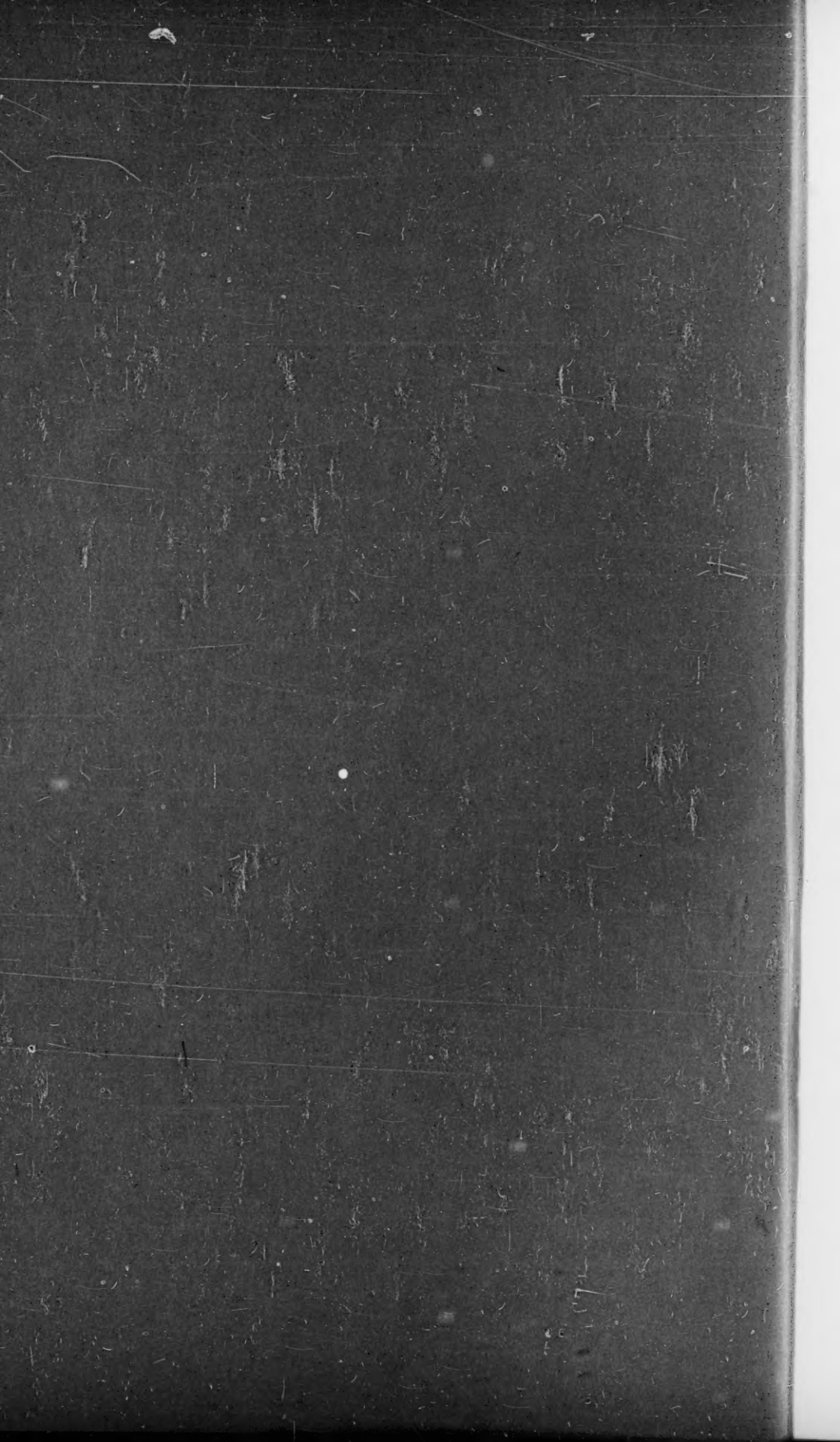
New York, New York 10005

(212) 422-3000

Of Counsel.

January 30, 1987

67 (14)



**COUNTERSTATEMENT OF QUESTIONS
PRESENTED FOR REVIEW**

1. Did the courts below err in enjoining police restrictions on Respondents' symbolic speech, where they found that such restrictions were the result of content-based discrimination?

(a) Where the only justification offered by the police in prohibiting Respondents' symbolic speech was the objections of hostile onlookers, did such police action enforce a content-based "heckler's veto"?

(b) Alternatively, was the district court clearly erroneous in finding that police officers were motivated by subjective sympathy with the Catholic Church, and not by a legitimate concern for public safety, when they denied Respondents permission to engage in symbolic speech?



2. Even assuming that the police had not engaged in content-based regulation of speech, did the district court err in finding that the police restriction imposed was not a narrowly tailored time, place or manner regulation?

(a) Must the courts always defer to a police officer's determination on the necessity of restrictions on speech in order to lessen an alleged potential for violence?

(b) Was the district court clearly erroneous in finding, based on seven days of trial testimony, that claims by police officers of a danger of violence were not credible, or even if they were credible, were not rational (particularly in view of available police resources to control any potential for violence)?



PARTIES TO THE PROCEEDING

Petitioners

Benjamin Ward
Edward I. Koch
The New York City Police Department

Respondents */

Michael J. Olivieri	David Lawlor
J. Matthew Foreman	Jim Cannon
Michael Dillinger	James Doyle
Richard Ferrara	Ned Lynam
Edmund W. Trust	Edward Byrne
Hugh R. Bruce	Michael Conley
John D. Edwards	Edward Harbur
Joseph Brown	Robert J. Buel
Julius J. Spohn	Christopher
Bernard L. Tansey	Wesolowski
Clint Winant	Gary W. Spokes

and

Dignity—New York, a not-for-profit corporation organized under the laws of the State of New York.

*/ Tom Kohler, who was originally an individual plaintiff in the district court, has since died.



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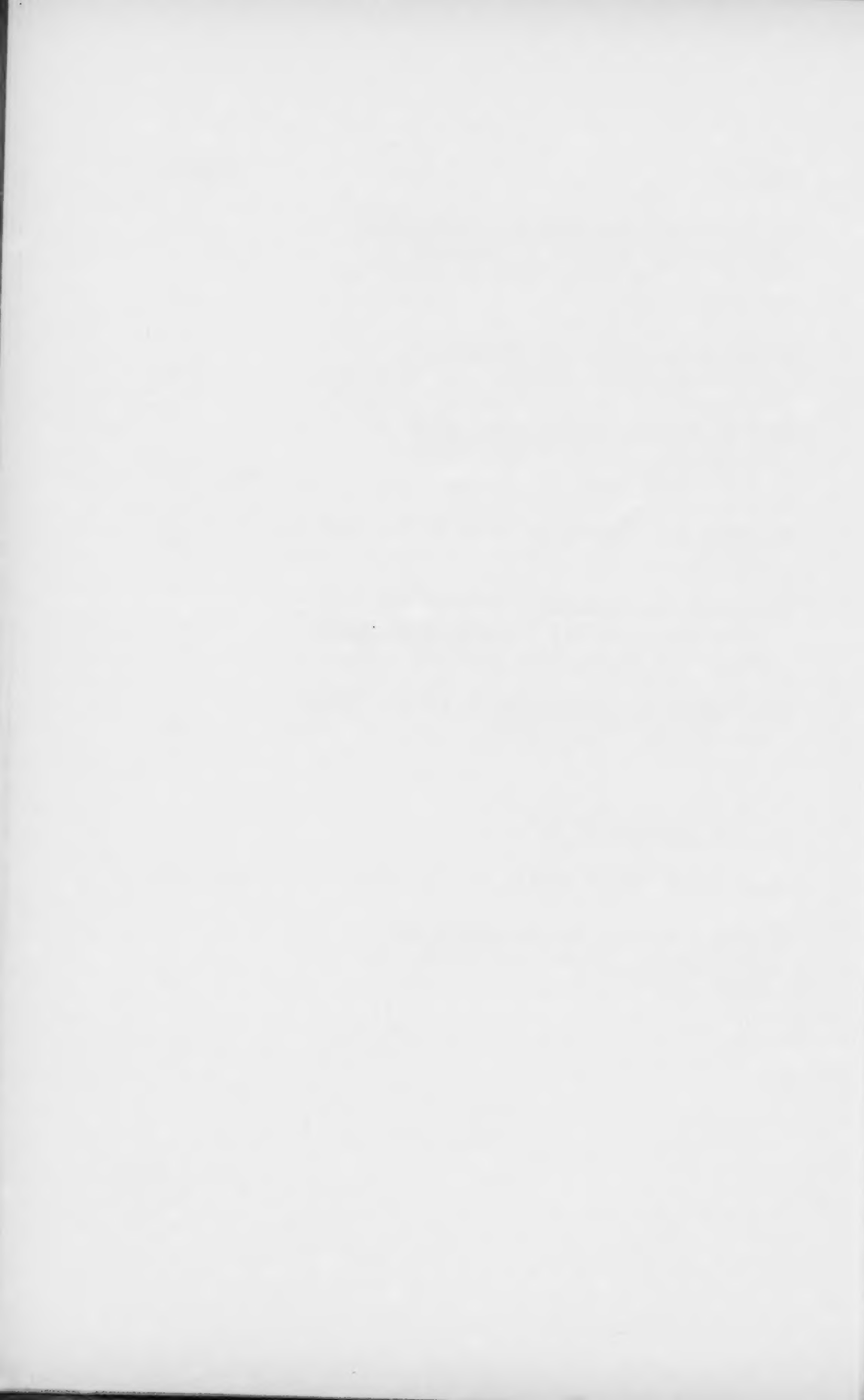
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No. 86-989

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity
as Police Commissioner of the City of New
York, EDWARD I. KOCH, in his official
capacity as Mayor of the City of New
York, and THE NEW YORK CITY POLICE
DEPARTMENT,

Petitioners,

-against-

MICHAEL J. OLIVIERI, et al.,

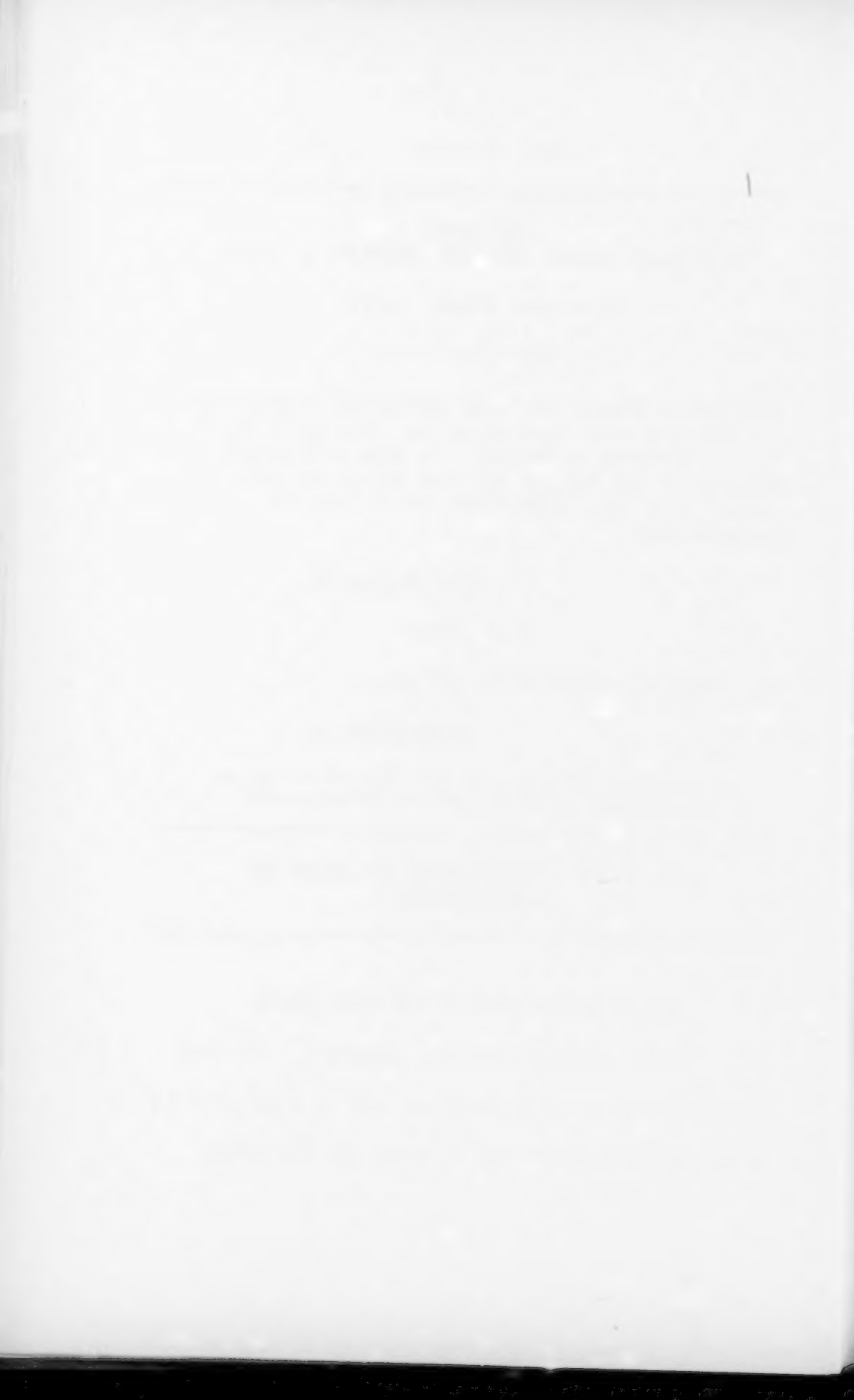
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF
CERTIORARI

COUNTERSTATEMENT OF THE CASE

This case presents unusual, if not
unique facts, concerning (1) a request by
a group conceded by all to be utterly



peaceful to demonstrate on a public sidewalk, and (2) the police response to that request, which response was found by the district court to be at best irrational, and at worst a covert attempt to suppress the viewpoint of the Respondents.

Applying this Court's well-established tests for assessing government restrictions on speech, the courts below found that the police had violated Respondents' free speech rights, based in part on a finding that the restrictions imposed by the Police Department were a result of its sympathy for the desires of the Catholic Church and certain anti-gay elements to keep Respondents off the public sidewalk in front of St. Patrick's Cathedral. In the face of an extensive factual record and findings detailing the Police Department's objective and subjective culpability on this occasion, Petitioners nevertheless ask that this Court grant certiorari



and use this case as a vehicle to announce a virtual abdication by the judiciary of any role in evaluating the constitutionality of police restrictions on speech. Particularly given the unusual facts present here, such a premise does not merit the plenary attention of this Court. 1/

A. The Speech at Issue

Dignity—New York is the local chapter of a national association of gay and lesbian Roman Catholics who seek to enjoy full communion with their Church, regardless of their sexual orientation. Its membership includes lay members, and

1/ References to "Petitioners' Appendix to Petition for Writ of Certiorari" are cited as "A__". Unless otherwise indicated, references in the Appendix are to the Findings of Fact and Conclusions of Law of the district court dated June 16, 1986. References to the opinion of the Court of Appeals are cited as "CA2 Op.: A__".

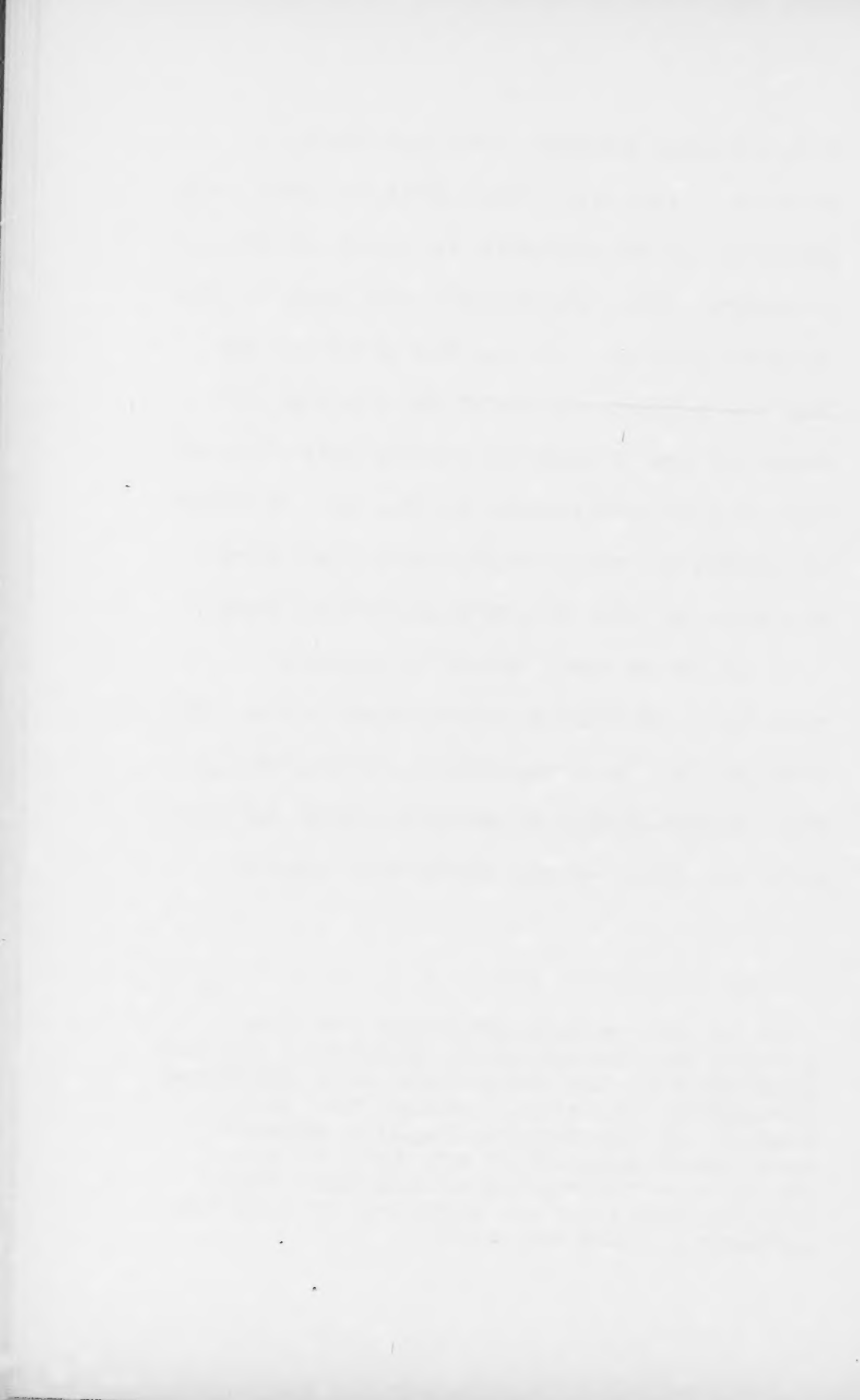
current and former priests, seminarians and religious brothers. (A39) The First Amendment controversy in this action arose in connection with the "Gay Pride Parade" (hereafter referred to as the "Parade"), which has occurred annually in New York City on the last Sunday in June for the past seventeen years. The Parade takes place pursuant to a permit issued by the Police Department, which superficially treats it just as any of the other major annual parades that take place in New York City each year. It gives expression to the social, political, and religious views of the gay community in New York, and is comprised of many different gay organizations in the region. Dignity participates as one such component. (A45-46)

Since 1976, the Parade has passed St. Patrick's Cathedral, the cathedral church of the Roman Catholic Archdiocese of New York, located on the east side of

Fifth Avenue between 50th and 51st Streets. (A45-46) From 1976 to 1982, the publicly owned sidewalk in front of the Cathedral (the "Sidewalk") was open to the general public. It was the practice of Dignity members to stand as a group in front of the Cathedral during this time as the rest of the Parade passed by, in order to symbolize their contention that they are part of the Church's spiritual body.

While on the Sidewalk, Dignity members conducted prayers, sang hymns, and engaged in other peaceful activities. 2/ More importantly, Dignity's visual presence in front of the Cathedral itself

2/ Dignity's demonstration was completely and consistently peaceful, and was permitted by the police who were stationed throughout the area. During the entire history of the Parade, Dignity members have never engaged in any form of violence, and the police acknowledge that Dignity would not do anything to harm the Cathedral. (A48-49, A100)



conveyed the very essence of their message—that they sought and were entitled to full membership in the Church, notwithstanding their sexual preference and the public opposition of the Church's hierarchy. (A47-48) Indeed, as indicated further below, the specific words used or signs displayed by Dignity are of only secondary importance to the symbolism of Dignity's presence on the Sidewalk.

Dignity's intended audience were other participants in the Parade as they passed by the Cathedral, as well as spectators, and particularly included disaffected Catholics and other gay sympathizers who might feel antipathy toward Catholicism due to the public positions of the Church hierarchy regarding homosexuality. As the district court noted, some Parade participants were openly hostile to the Catholic Church. (A49-50) It was therefore crucial to



Dignity's message to be visible not only to spectators, but to other marchers in the Parade as they passed the Cathedral. 3/ As will be seen, it was the powerful symbolic message inherent in Dignity's presence in front of the Cathedral as the Parade passed by that motivated the actions of certain anti-gay groups, the Archdiocese of New York, and ultimately the New York City Police Department.

B. The Police Response

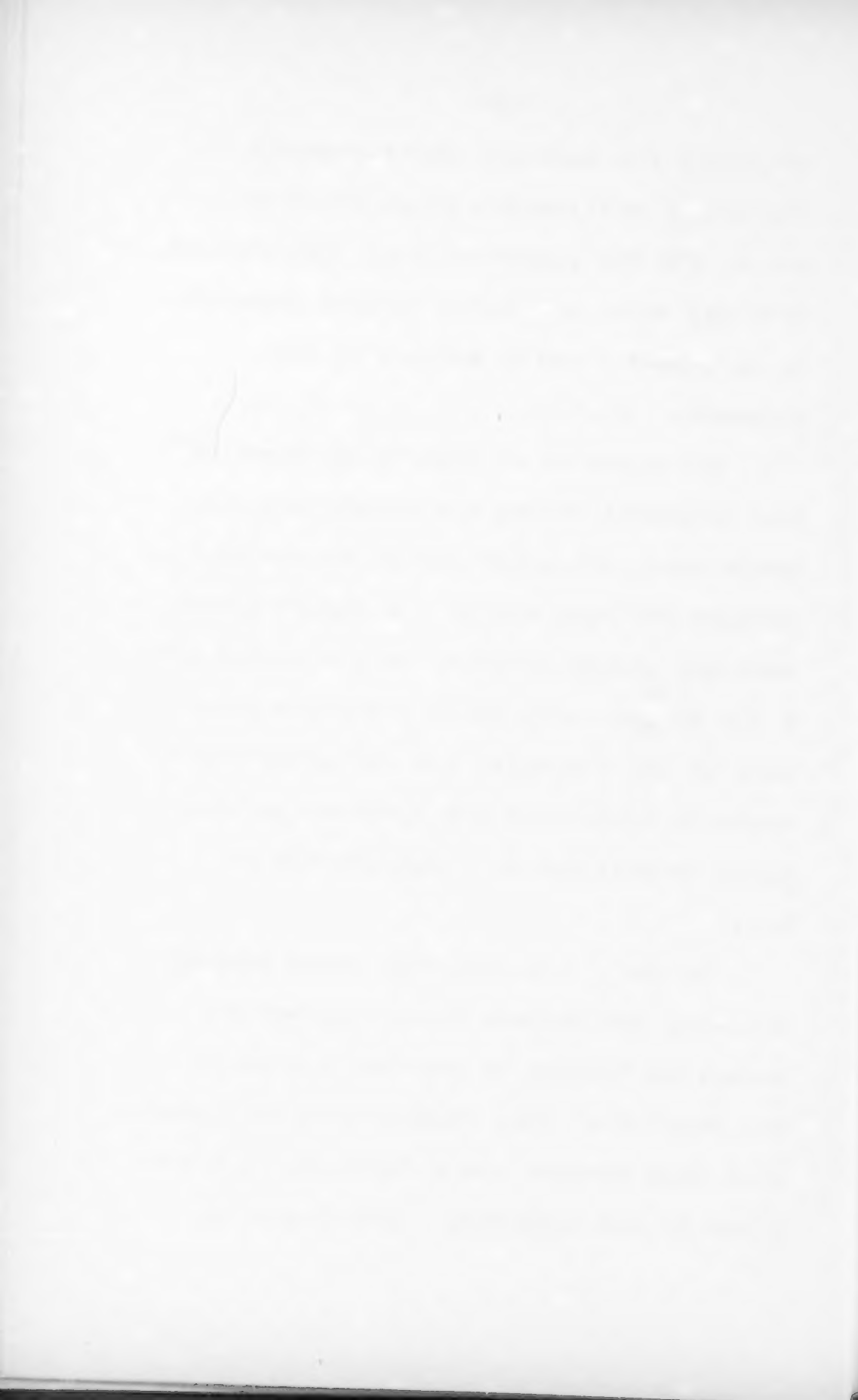
Beginning in 1983, the Police Department refused to allow Dignity access to the area in front of the Cathedral,

3/ The record indicates that Dignity's symbolic presence in front of the Cathedral had its desired effect. Not only did Parade participants applaud Dignity as they passed, but anti-Catholic expressions in front of the Cathedral were curtailed out of respect for Dignity. (See A49; Joint Statement of Agreed Facts dated August 20, 1986, ¶¶ 10, 11(a))

including the publicly owned Sidewalk. The sole justification given for this action was the purported fear that various anti-gay onlookers would attempt physically to attack Dignity members on the Sidewalk. (A84)

The presence of Dignity in front of the Cathedral during the Parade had, in years past, attracted the attention of various anti-gay groups. Although these anti-gay groups objected to the entire Gay Pride Parade, they found Dignity's presence on the Sidewalk, and its adherence to Catholic traditions and symbols, particularly objectionable. (See A56-57; Tr. 513)

In 1983, two gentlemen named Andrew McCauley and Herbert McKay created the so-called "Committee for the Defense of St. Patrick's" (the "Committee") to combat what they thought was a "symbolic desecration" of the Cathedral. The Committee



coordinates opposition to the Parade by various anti-gay groups. Keeping Dignity and other gay organizations off the Sidewalk is one of the anti-gay groups' major purposes, and as long as Dignity or other gays are banned from the Sidewalk, the anti-gay groups state that they have no interest in being there. (A54-55, A57-58, A146)

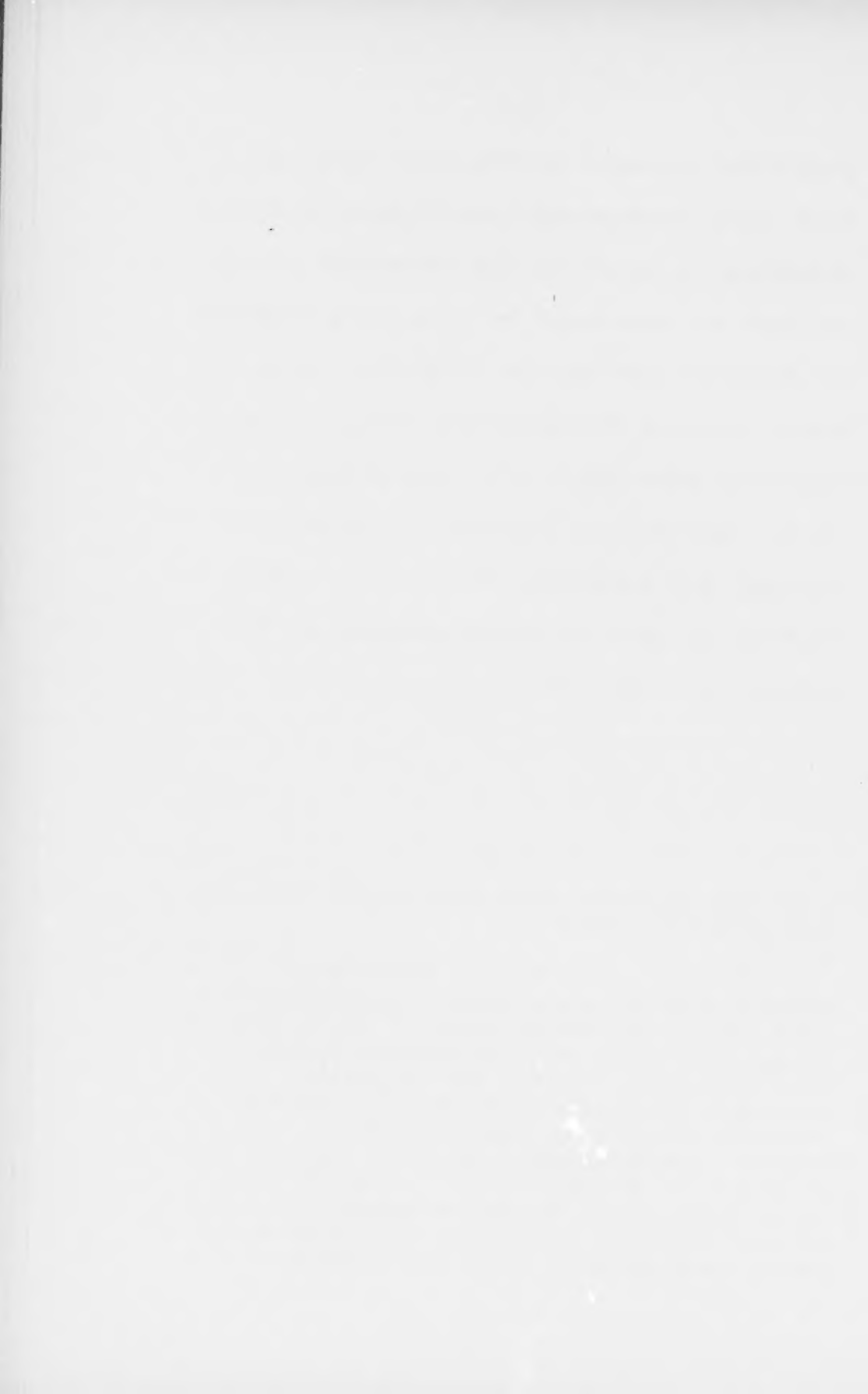
Since 1983, the Department has held meetings at police headquarters with representatives of the anti-gay groups, including Messrs. McKay and McCauley, in order to ascertain their intentions for the upcoming Parade. At each of these meetings, the anti-gay groups expressed their fervent opposition to Dignity's presence on the Cathedral Sidewalk. Police Department officers stated that it was from these meetings, and from their own independent evaluation of the

political climate in New York City, 4/ that they determined that Dignity's mere presence in front of the Cathedral would in fact be construed by some as a "symbolic desecration" of the Cathedral, and would thereby increase the possibility of violence from these anti-gay groups.

(A58) The Police Department therefore "froze" the Sidewalk, forbidding access to Dignity as well as other members of the public. 5/ (A51-52)

4/ See A86-87. See also infra note 35 and accompanying text.

5/ In 1983, the Police Department established an alternative demonstration area on the sidewalk west of Fifth Avenue (i.e. away from the Cathedral) between 51st and 52nd Streets for Dignity. In 1984 and thereafter, this alternative demonstration area was located on 51st Street, approximately 35 feet west of the curbline of Fifth Avenue. Dignity has never used these areas, however, in light of the negative symbolism conveyed by being shunted away from the Cathedral.



The Police Department itself states that, were it not for the opposition of the anti-gay groups, it would open the Sidewalk to Dignity as it did before 1983. (A84, A86) As the district court found, therefore, the Police Department's decision to close the Cathedral Sidewalk was made "precisely to allay objections of anti-gay and anti-Dignity counterdemonstrators". 6/ (A86) It was this action that formed the basis of this case.

6/ The satisfaction of the anti-gay groups was noted to Chief Kerins:

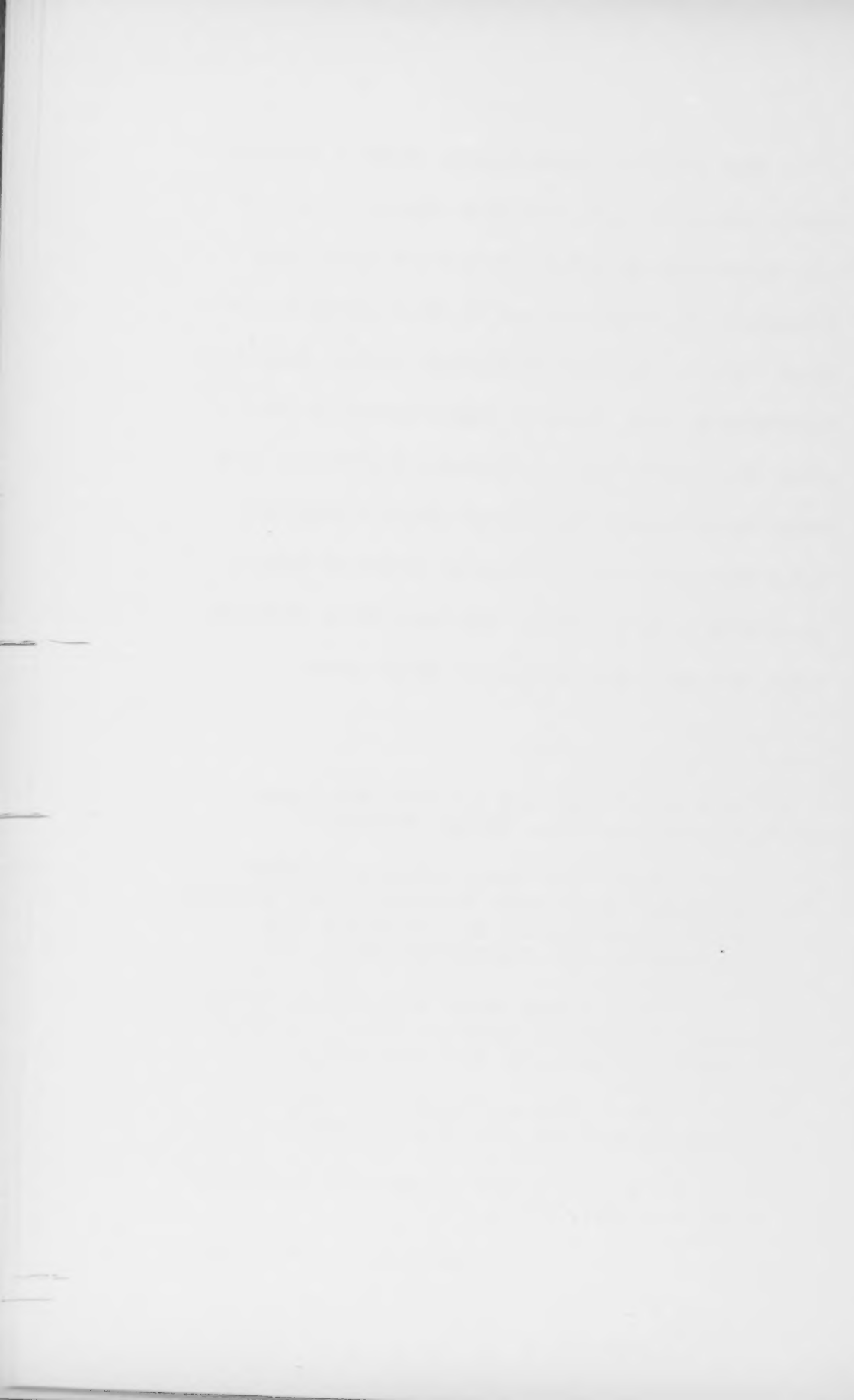
"Q. Did they [the anti-gay groups] indicate whether they agreed with that decision [closing the Sidewalk] or disagreed with it?

"A. They were satisfied with that decision because that is what their objective was all about.

"Q. Was to keep the Dignity demonstrators off the sidewalk?

"A. Off the sidewalk in front of St. Patrick's."

(footnote continued)



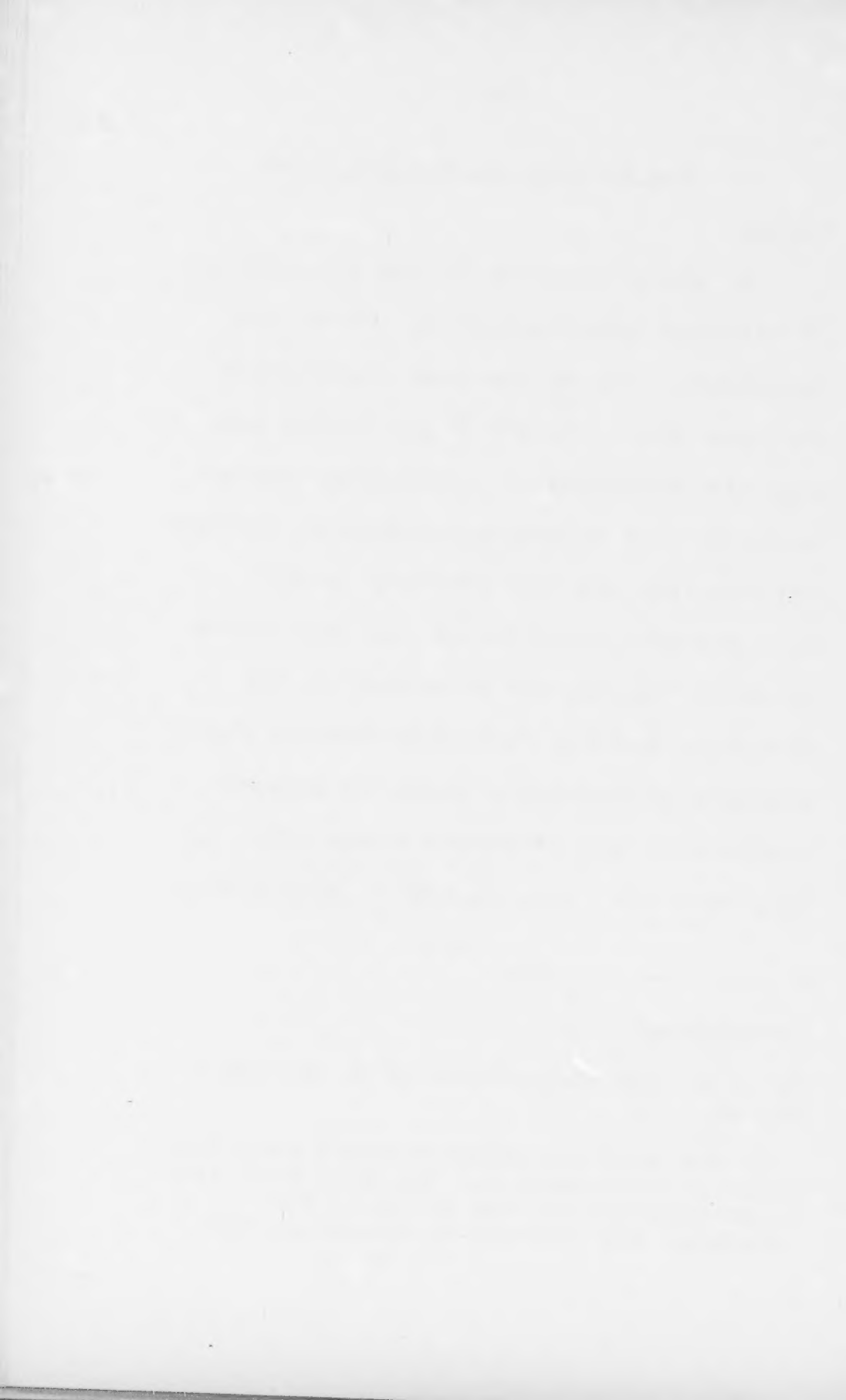
C. The History of the Gay Pride Parade

In sharp contrast to the predictions of violence hypothesized by the Police Department, one of the most distinctive features about the Gay Pride Parade has been the historically uneventful coexistence between Parade participants, including Dignity, and the anti-gay groups. This peaceful coexistence includes years in which Dignity was permitted on the Sidewalk, and has continued despite the presence of varying numbers of antagonistic anti-gay onlookers since 1981. 7/ (See A67, A74, A82, CA2 Op.: A11-12 n.1)

(continued)

PX 1, p. 205 (deposition of G. Kerins); A87-88.

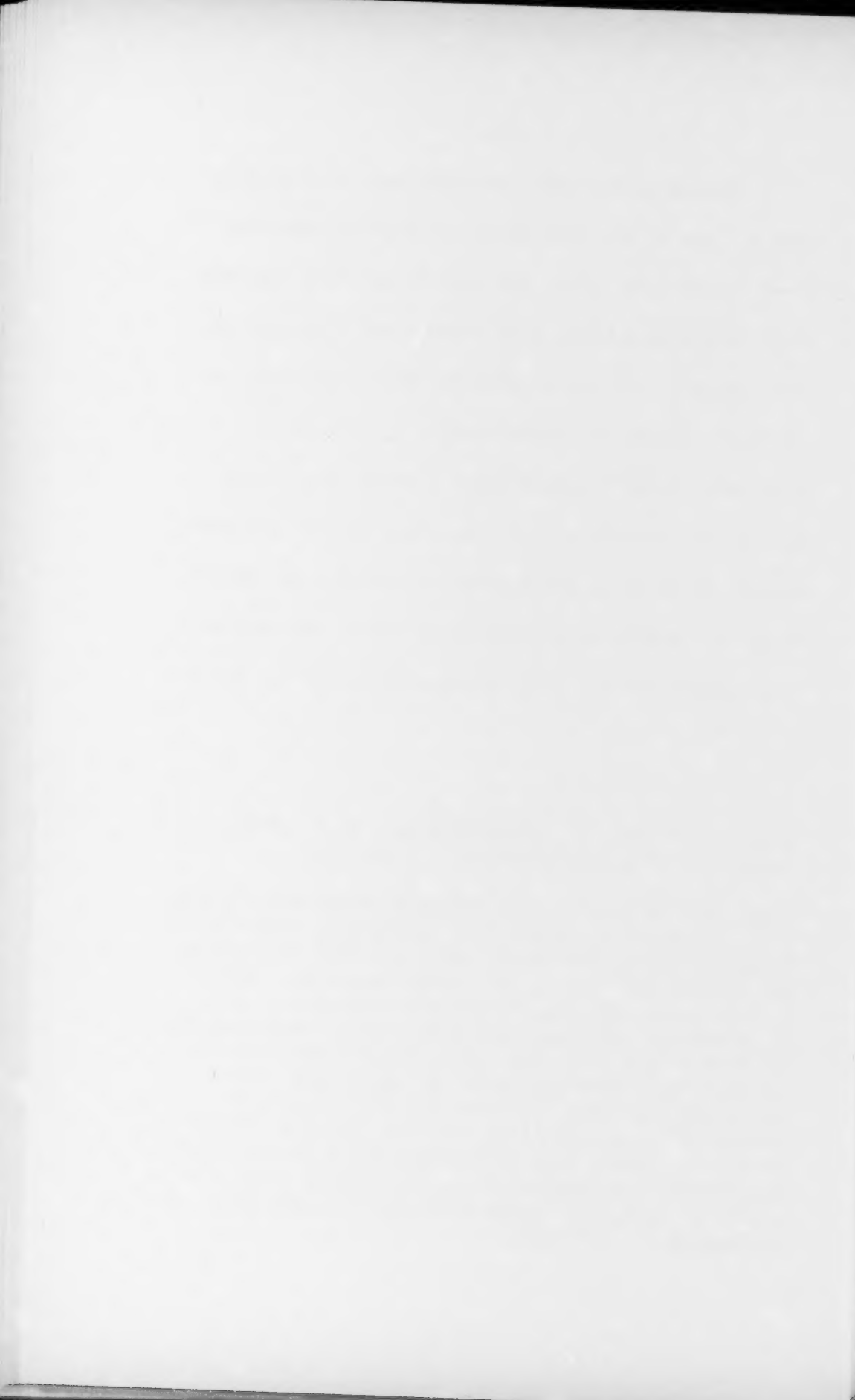
7/ The anti-gay demonstrators have drawn their participants for the most part from local chapters of the Catholic War Veterans, the Knights of Columbus, the



These anti-gay groups are now assigned an area by the police approximately 35 feet from the line of march of the Parade, well within sight and sound of the marchers (and also well within throwing range, if they were so inclined). 8/ Nonetheless, there have never been any incidents of violence at the Gay Pride Parade, apart from two scuffles in 1981, in which Messrs. McKay and McCauley were arrested for confronting gay demonstrators in front

Ancient Order of Hibernians, and other Catholic organizations. (A52-54)

8/ Since 1984, the Police Department has established an area for anti-gay groups on 50th Street, 35 feet west of the curbline of Fifth Avenue. In 1983, however (the first year of the Sidewalk freeze), the Department placed the anti-gay contingent on the sidewalk directly abutting the line of march. The purpose of placing the anti-gay groups closer to the line of march was, according to the Police Department, so that the anti-gay groups could see that the Department had kept its promise not to allow gay groups on the Sidewalk. (A67-68)

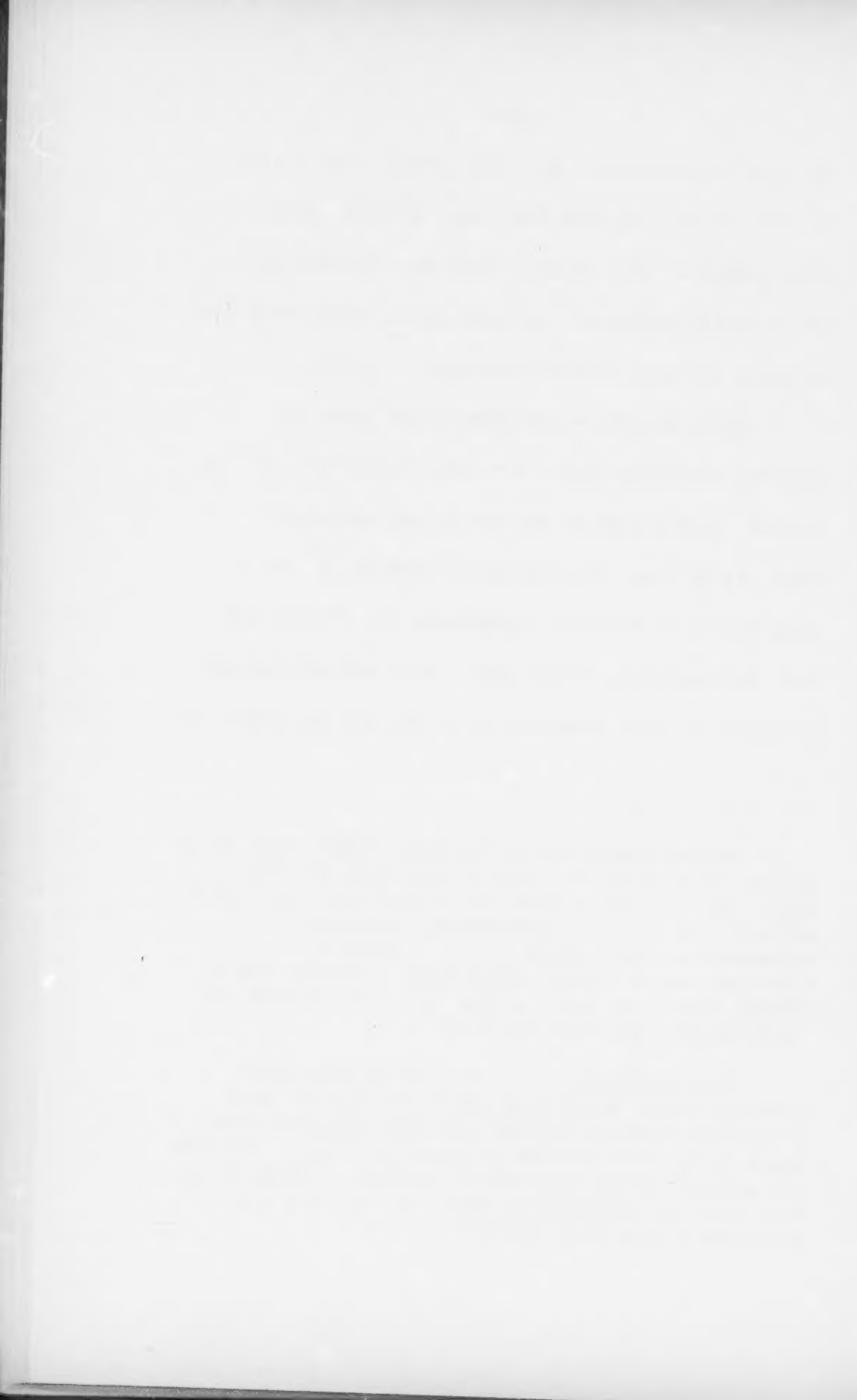


of the Cathedral. 9/ In 1982, when the front of the Cathedral was again open to the public, Mr. McKay and Mr. McCauley were both present in the area, but did not engage in any altercations. (A62)

This history of non-violence is hardly surprising. As the district court found, although some anti-gay groups certainly had profound objections to Dignity's symbolic presence in front of the Cathedral, they were all established groups in the community with no history or

9/ There were no injuries resulting from these encounters, and McKay and McCauley were merely detained in a police van until after the Parade was over, issued summonses, and sent home. (A60-61) Charges were later dropped. These incidents are the only arguable instances of "violence" at the Parade.

The district court noted the genuinely surprised demeanor of McKay and McCauley during trial at the suggestion that they now would resist police commands to desist from violence (A102). See also Tr. 531-32 (McCauley acts so as to avoid getting arrested again).

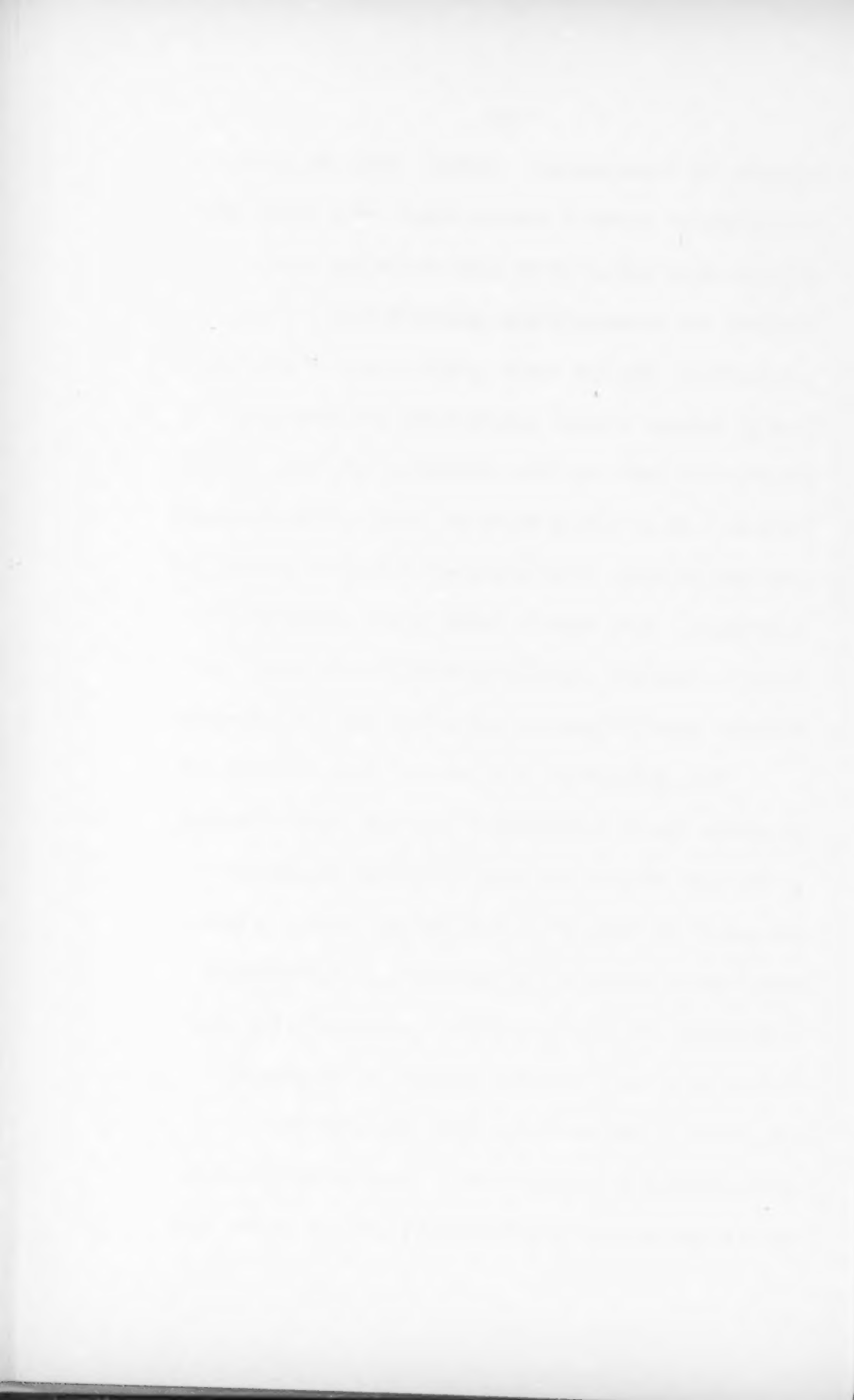


agenda of violence. (A53) The Police Department itself notes that the anti-gay groups are generally law abiding and intend to demonstrate peacefully.

(A101-03) While each year they unambiguously voice their antipathy to the gay community and to the message of the Parade, they have stated their theological and political differences without physical incident, and apart from some name-calling, without confrontation with the Parade participants passing by. (A116-17)

The peaceful nature of the Parade is perhaps best indicated by the most recent, 1986 Gay Pride Parade, during which 25 members of Dignity and 25 anti-gay adherents were both allowed on the Cathedral Sidewalk for 30 minutes, pursuant to the interim order of the court of appeals.

(A29-30) As before, the Parade was completely non-violent. The predictions of large scale confrontations if even two



members of Dignity were on the Sidewalk for more than a matter of seconds, upon which the police predicated their decision to ban Dignity from the Sidewalk, simply did not materialize.

In large part, the Department bases its alleged concerns about violence upon predictions of large numbers of anti-gay adherents appearing at the Parade. 10/ (A63) During the meetings between the Police Department and the anti-gay groups that have occurred prior to the Parade for the past four years, Messrs. McKay and McCauley have consistently predicted the presence of thousands of anti-gay demonstrators at the Parade. Remarkably, the

10/ The Police Department somehow distinguishes the danger of violence toward Dignity from the general hostility that might exist between the anti-gay groups and Parade marchers in general (A84-85), a hostility that, of course, would exist regardless of Dignity's presence on the Sidewalk.

Department relies on these predictions.

(A106) In reality, however, the anti-gay groups have never amassed more than 150 participants. 11/

The district court, based upon the long and peaceful history of the Parade, the Police Department's consistently exaggerated projections of the numbers of anti-gay onlookers who would appear, the lack of any articulable and substantiated reason to fear violence, and lastly upon its own evaluation of the lengthy

11/ The record indicates that the following number of anti-gay groups appeared at past Parades, as compared with the number predicted by anti-gay organizers to the police.

<u>Year</u>	<u>Predicted</u>	<u>Actual</u>
1983	25,000	100
1984	"thousands"	75 to 100
1985	"thousands"	140 to 150
1986	2000 to 3000	150

(A63-64, A67, A69, A72, A75-76, A80-81, A83; CA2 Op.: A11-12 n.1)

testimony of the responsible police officers, representatives of the anti-gay groups, and Dignity officers, concluded that the allegations of potential violence given by the police were not credible, or even if credible were not rational. 12/
(A135)

12/ The district court heard testimony from Commissioner Benjamin Ward (during the hearings for preliminary injunction), Assistant Chief of Police Gerard J. Kerins (the operational officer in charge of the Parades from 1984 to 1986), former Assistant Chief of Police Milton Schwartz (the operational officer in charge of the 1983 Parade), and Lieutenants David Tarantino and Joseph Congelosi (officers in the Patrol Borough Operations Unit responsible for planning police coverage of the Parade).

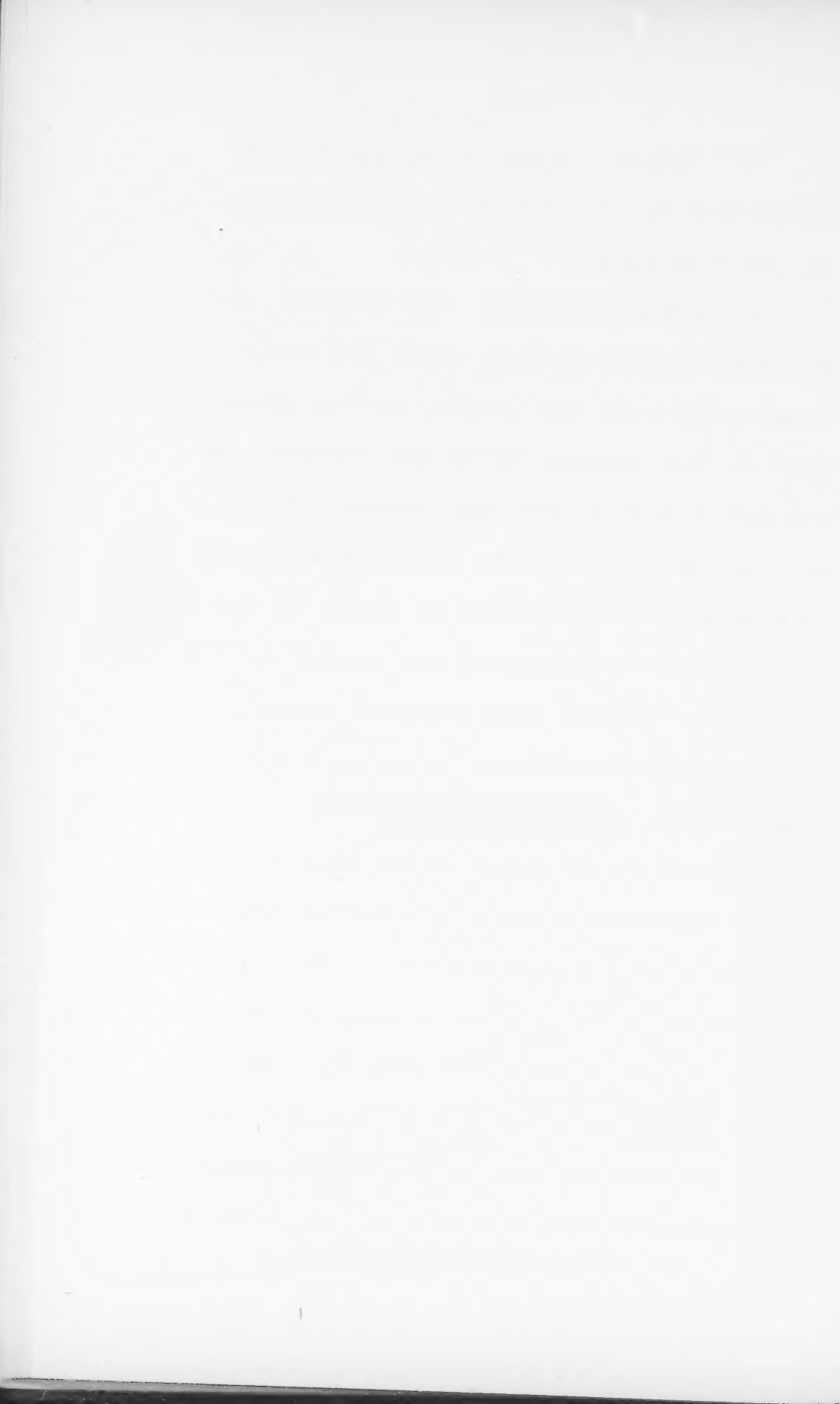
The court also heard the testimony of Messrs. McKay and McCauley (the leaders of the anti-gay groups), and of Matthew Foreman, Esq., and Timothy Coughlin, Esq. (officers of Dignity and participants in past Gay Pride Parades). Also testifying at trial was Monsignor James Rigney, the Rector of St. Patrick's Cathedral.



D. The Relationship of the Police Department to the the Catholic Hierarchy of New York City

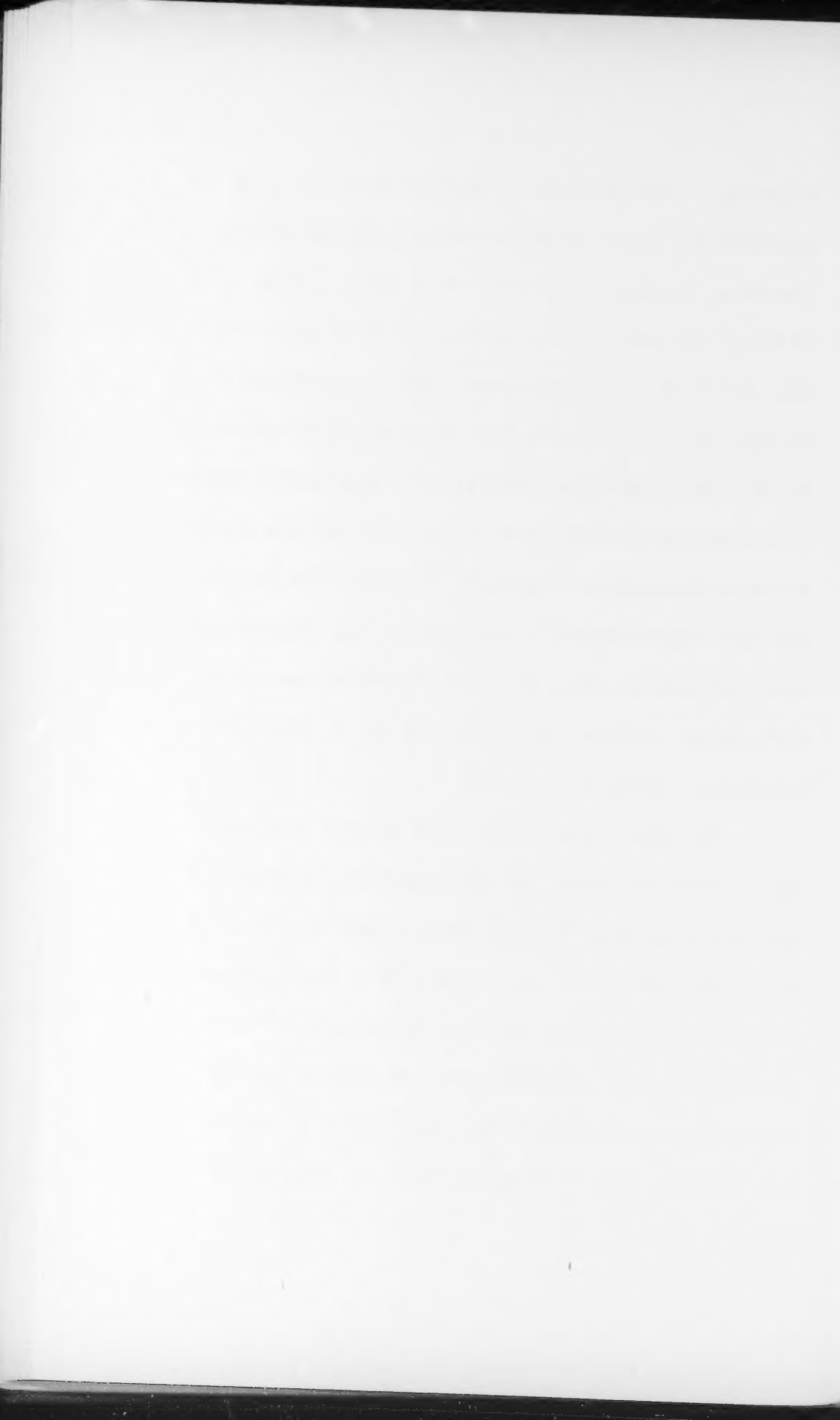
From the foregoing, the conduct of the Petitioners in this case, and their suggestion that the largest police department in the country could not control 150 peaceably minded anti-gay demonstrators without banning Dignity from the Sidewalk, is somewhat inexplicable in light of the "negligible" evidence of any danger of violence. (A135) The district court, however, found evidence to support an explanation.

The district court found that the Police Department had a history of complicity with the Archdiocese of New York in responding to Dignity's request for access to the Sidewalk. (A64-67, A69-71, A151-52) In 1983, when the "freeze" was first introduced, the police held secret meetings with Church hierarchy concerning



Dignity. An internal church memorandum generated from that meeting addressed to Terence Cardinal Cooke (the late Archbishop of New York) reflects a scheme with the police to offer post hoc justifications to the public for excluding Dignity from the Sidewalk (A66), and suggests that the police action was actually in response to the Church's request. (A151) At the Police Department's request, the Rector of the Cathedral denied that such a meeting had taken place, when asked by a Dignity leader. (A66-67)

In 1984, when Dignity again pressed its right to have access to the Sidewalk, the Police Department suggested to the Archdiocese that it schedule a special religious service at the Cathedral during the Parade to accommodate a facially secular explanation to Dignity for restricting its demonstration in front of



the Cathedral. 13/ The Acting Administrator of the Archdiocese in fact approved the idea, although in the end no such service was held. (A69-71)

For the 1986 Parade, the Police Department took the unusual step of contacting on its own initiative (the week before trial began) certain Catholic groups in the greater New York area (many of which had never appeared at prior Gay Pride Parades and with which even the Committee had not made contact) to see if they were interested in joining the anti-gay demonstrators. 14/ (A108-12)

13/ There was no regularly scheduled service at the Cathedral at the time the Parade passes by. Local ordinance restricts the use of sound devices within 500 feet of a church when a service is actually in progress. The Rector of the Cathedral (to whom this request was made), however, was under the impression that a demonstration would be totally forbidden if a service were held. (A70)

14/ Participation of these groups in

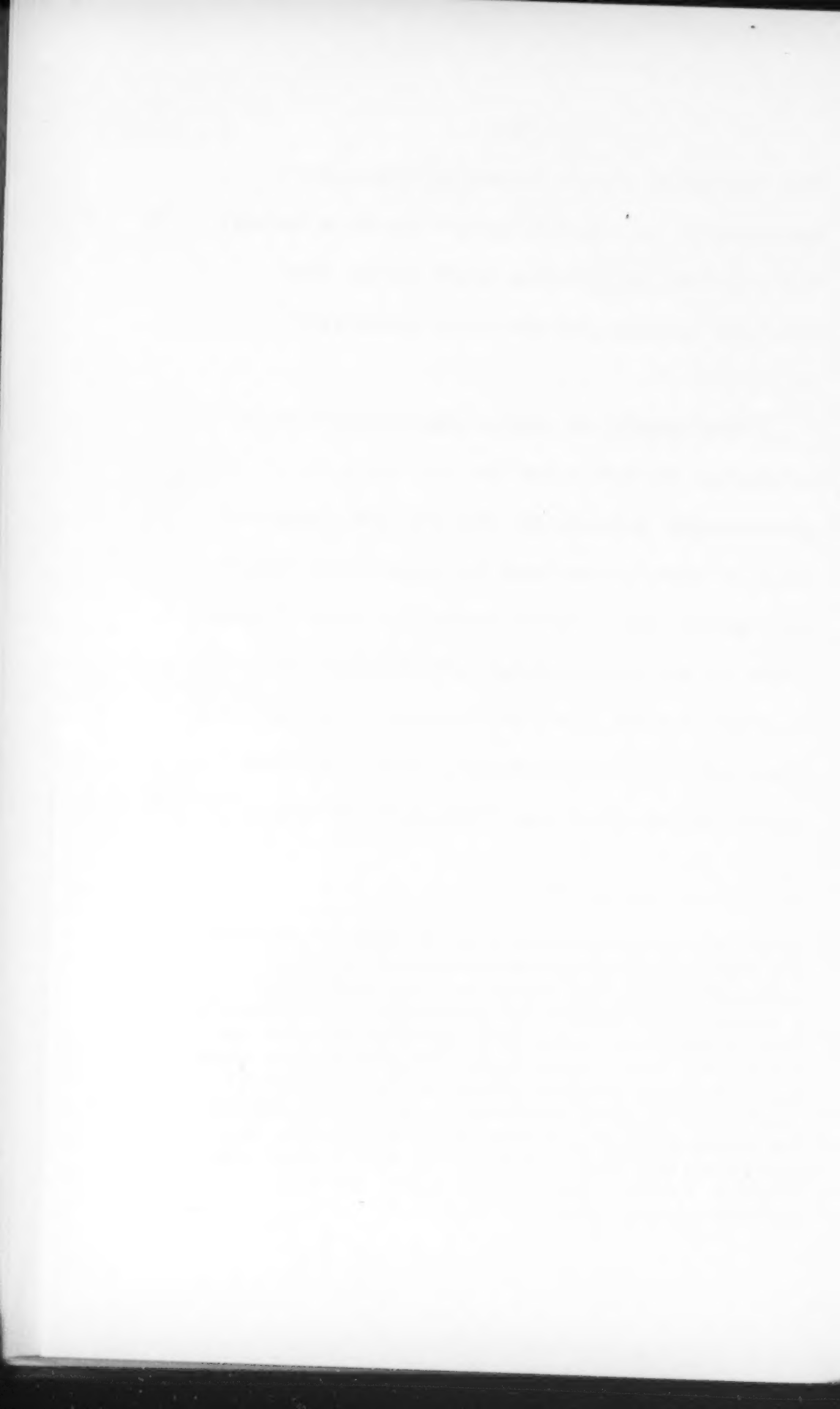


The district court found a "certain appearance of impropriety" in this behavior, which called the good faith and motives of the police into question.

(A110-11)

The district court considered this evidence in addition to the utterly pretextual nature of the Police Department's justifications in excluding Dignity, which that court found in itself might lead to an inferential conclusion of content-based discrimination. (A150) In view of all the evidence, the district court found that the "freeze" of the

1986 would presumably have lent credence to the previously exaggerated police estimates of the size of the anti-gay groups that would be present. Ironically, the number of anti-gay demonstrators in 1986 was 150, i.e. approximately the same as previous years, despite Petitioners' contention that anti-gay sentiment would be intensified in New York City due to, inter alia, the passage of the local Gay Rights Bill. See infra note 35 and accompanying text.



Sidewalk was the result of a covert attempt by the Police Department to appease the anti-gay groups and the Church. (A136, A151-52) The court of appeals concurred, stating that:

"In the instant case, we agree with the district court that the restrictions imposed were not drawn solely to further the government's conceded interest in public safety."
(CA2 Op.: A17)

REASONS FOR DENYING THE WRIT

Summary

The law announced by this Court for assessing government restrictions on speech is well-established, and was applied in a straightforward manner by the courts below. (A12-14, A140-43) Applying these tests, the district court first found that the restriction here failed the test of content neutrality and was therefore impermissible. (Part I) Alternatively, applying the test set forth in Clark v. Community for Creative



Non-Violence, 468 U.S. 288 (1984), the district court inquired whether the "freeze" was narrowly tailored to meet a significant government interest, but found that the police freeze failed that test as well. (Part II) The facts of this case may be remarkable, but the analysis employed was not.

I. THE DECLARATION OF UNCONSTITUTIONALITY WAS COMPELLED BY THIS COURT'S REPEATED PROHIBITIONS OF CONTENT-BASED DISCRIMINATIONS AGAINST SPEECH.

The premise Petitioners ask this Court to endorse is that, in assessing the validity of content-neutral time, place or manner restrictions on protected speech, the courts are completely incompetent to decide whether "good faith" police decisions are reasonable or at all supportable. The dubious value of this proposition is discussed infra. More importantly, as the record abundantly reveals, and

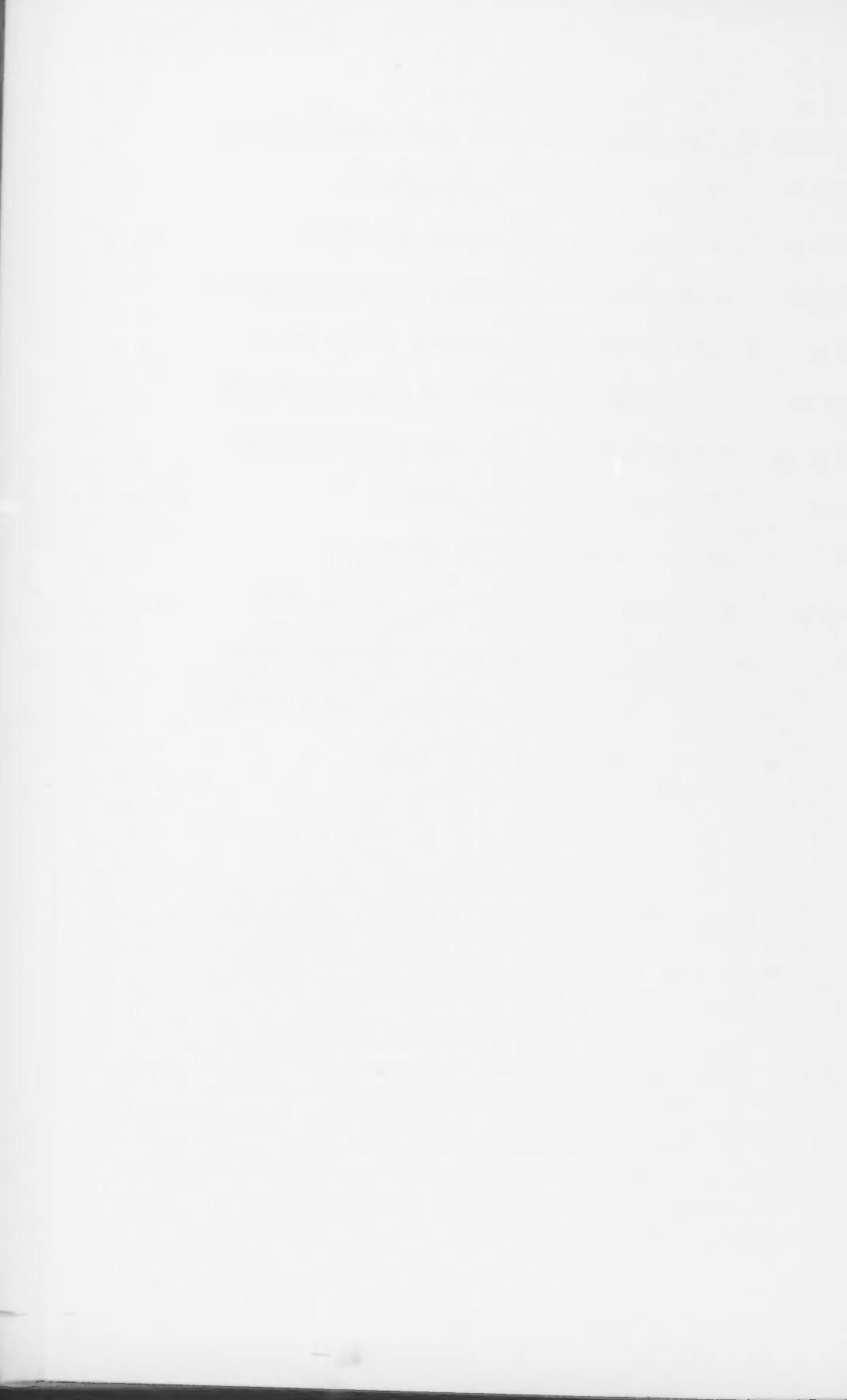


as the trial court found, the restriction imposed by the police was neither content-neutral nor in "good faith".

There is therefore no occasion to determine the question Petitioners seek to raise, since the "freeze" of the Sidewalk was not a time, place or manner restriction. Rather, it was an openly content-based, and what is more, a viewpoint-based restriction. Such restrictions are, of course, presumptively invalid. 15/ This, we contend, provides a speedy end to the analysis. 16/

15/ E.g., Police Department v. Mosley, 408 U.S. 92, 95 (1972); accord, Widmar v. Vincent, 454 U.S. 263, 276 (1984); Carey v. Brown, 447 U.S. 455, 465 (1980).

16/ Because of Respondents' success on their free speech claim, the courts below did not find it necessary to address the alternative ground that giving the Church effective discretionary control over access to a public sidewalk violated the Establishment Clause. See Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).



A. The Police Ban on Dignity's Demonstration Constitutes a Heckler's Veto.

The district court's finding that the police action was the result of content-based discrimination directed precisely at the content of Dignity's symbolic message is amply supported by the record, and indeed is, in many respects, based upon undisputed facts. The Police Department itself explains that it is the unique message conveyed by Dignity's mere presence on the Sidewalk that the anti-gay groups construe as a "symbolic desecration" of the Cathedral. It is this adverse reaction from the anti-gay demonstrators, and the alleged danger of violence engendered, that purportedly prompts the Police Department to remove Dignity from the Sidewalk.

This case presents the paradigmatic "heckler's veto" repeatedly held by this



Court to be an invalid basis for restricting the exercise of free speech. 17/ "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." Street v. New York, 394 U.S. 576, 592 (1969). Indeed, the courts have

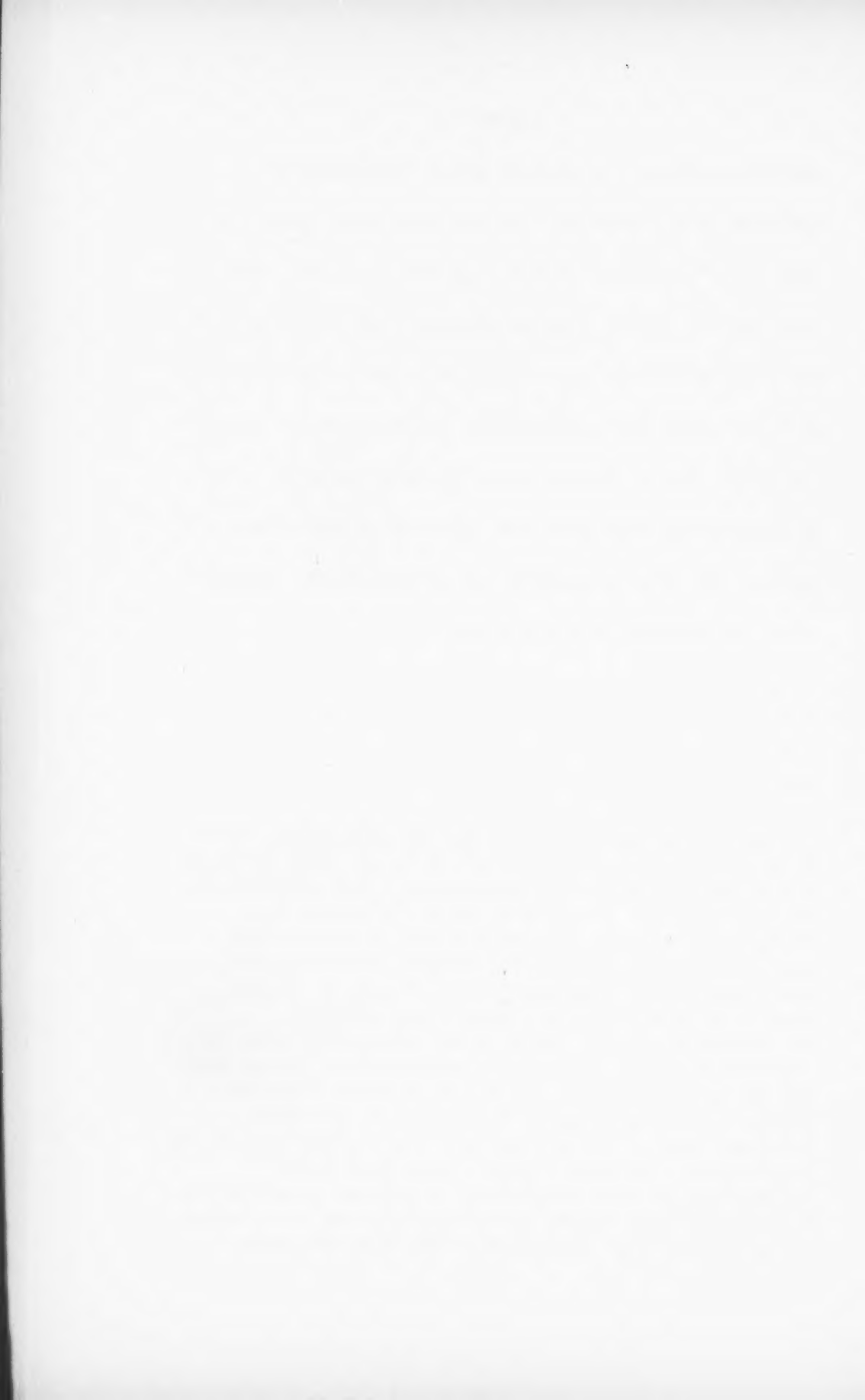
17/ E.g., Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971); Bachellar v. Maryland, 397 U.S. 564, 567 (1970); Gregory v. City of Chicago, 394 U.S. 111 (1969); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).

Accord, Wiegand v. Seaver, 504 F.2d 303, 306 (5th Cir. 1974), appeal dismissed, 421 U.S. 924 (1975); Beckerman v. City of Tupelo, 664 F.2d 502, 509-10 (5th Cir. 1981); Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 611, 616-18, 373 N.E.2d 21, 22-23 (1978) (per curiam) (display of swastika by American Nazis could not be enjoined even though violence was threatened and an estimated 10,000-15,000 counterdemonstrators were scheduled to appear).



consistently rejected such heckler's vetoes even where the police are responding to violence actually occurring, not (as here) just the speculative possibility of violence (a possibility that is inherent in any large public gathering). 18/ In sum, this Court has consistently prohibited the police from buying its peace at the expense of protected, albeit controversial expression.

18/ In Gregory v. City of Chicago, 394 U.S. 111, the Court ruled that the police violated the First Amendment by arresting civil rights marchers for failure to disperse where the marchers themselves were orderly, but onlookers were unruly and hostile. Gregory involved a great deal of actual violence, in which onlookers threw eggs and rocks at the marchers (id. at 117)—something that has never occurred at the Gay Pride Parade (A99). In Gregory, then, the police action was a response to violence actually occurring at the time, whereas here defendants are imposing a prior restraint based on the mere possibility of violence from anti-gay observers of the Parade.



Petitioners blithely claim that "[t]here has been no attempt to 'grant the use of the forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views'". 19/ Yet the facts of this case reveal that this is exactly what has occurred. As the Police Department itself conceded, had Dignity's symbolic message been "more favored" or "less controversial", so as to allay the objections of the anti-gay demonstrators, then it would have granted access to the Sidewalk as in previous years. 20/

19/ Petition at 27 (quoting Police Department v. Mosley, 408 U.S. at 96).

20/ As Assistant Chief Gerard J. Kerins (the operational officer in charge of policing the Parade) testified:

"[T]he counterdemonstratos are not counterdemonstrating because they want to demonstrate in front of St. Patrick's, they are demonstrating because they don't want the other

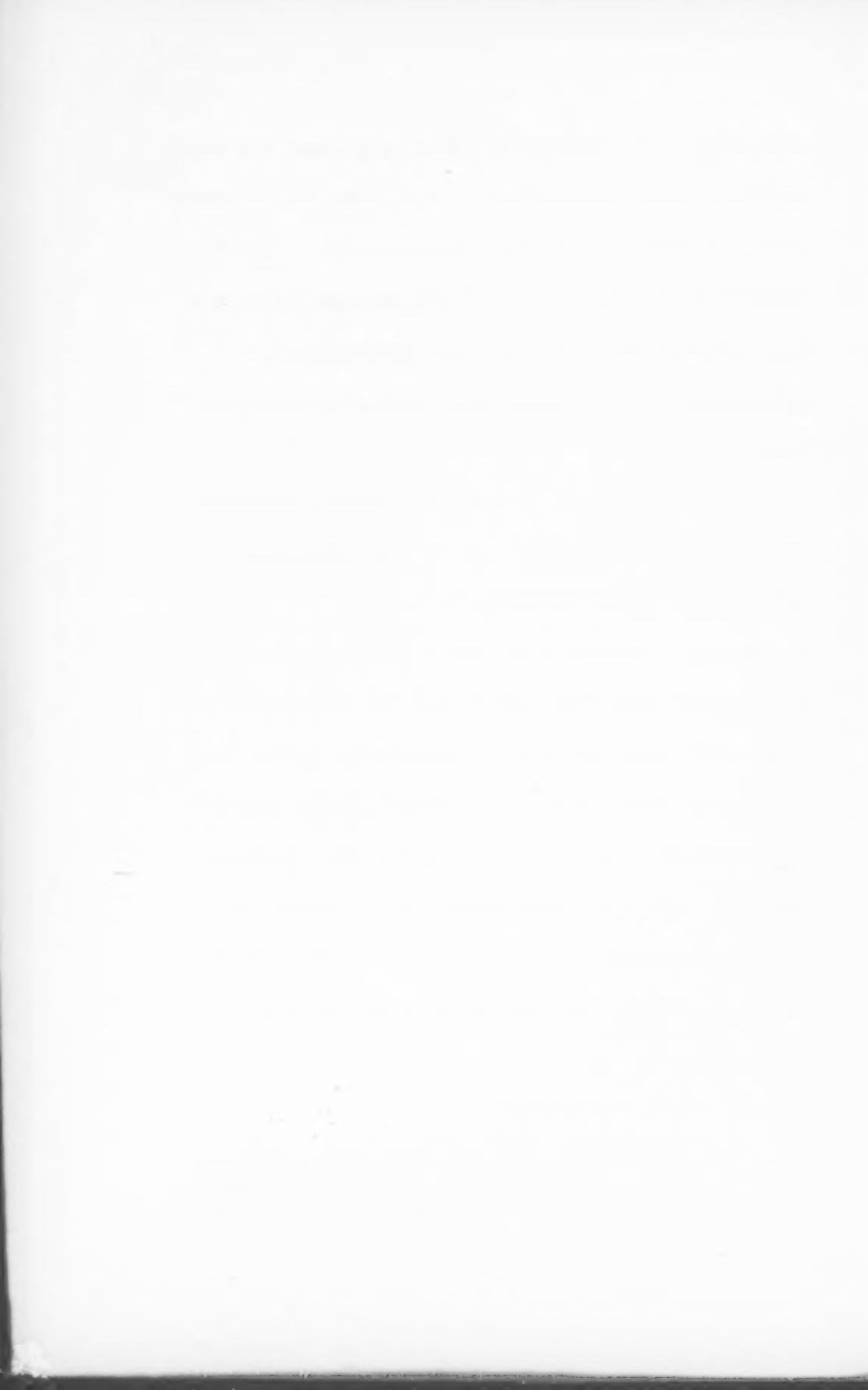


(A84-86) It therefore has engaged in pure content discrimination, and not in neutral time, place or manner regulation. As the district court found, "The matter and not the manner of plaintiffs' message is precisely the reason for its restriction."

(A143-44)

Petitioners' repeated characterization of the "freeze" as a "de minimis" intrusion into Dignity's speech is simply illogical, since the very reason articulated for the "freeze" was to suppress the symbolic speech that apparently irks the anti-gay contingent. Indeed, one issue upon which Dignity, the anti-gay groups, and the Police Department all agree is that the symbolism inherent in Dignity's mere presence on the Sidewalk is the

group [Dignity] demonstrating there in what they consider to be a desecration of the Cathedral". (Tr. 413)



operative event in the controversy, not the words or signs used (Tr. 15-16, 366-67, 608-09). 21/ It is for this reason that Dignity seeks access to the Sidewalk, that the anti-gay groups object to such use of the Sidewalk (Tr. 513, 567-70, 572-73), and that the Police Department removed Dignity from the Sidewalk (Tr. 363-64, 901).

Although the Petitioners now concede, as they must, that the "content of respondents' speech is not unrelated to the need to keep the Cathedral sidewalk closed" (Petition at 28), they contend that they

21/ The expressive activity here is thus analogous to those historic cases dealing with sit-ins or demonstrations by blacks in segregated areas. Brown v. Louisiana, 383 U.S. 131 (1966) ("silent and reproachful presence" by blacks in segregated library); Taylor v. Louisiana, 370 U.S. 154 (1962) (blacks present at "whites only" bus depot waiting room); Garner v. Louisiana, 368 U.S. 157 (1961) (black sit-in at "white" lunch counter).

are motivated only by a desire to avoid the "secondary effects" of such speech, citing City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925 (1986).

Renton, however, does not alter the applicable jurisprudence and allow content-sensitive regulations to be justified by a "pure heart" defense. 22/ In the first place, the decision in Renton rested in large part upon the trial court's factual finding that the predominate intent of the city council in enacting the zoning ordinance in question was directed not at the content of the speech but at the secondary effects of adult movie theatres on the community. 106 S. Ct. at 929. Here, the trial court

22/ Even if one were to read Renton as condoning some type of content-based discrimination, it certainly cannot be said to encompass viewpoint-based discrimination, such as is present here.



rendered a factual finding precisely to the contrary (A149), and thus Renton is inapplicable.

Perhaps more fundamentally, it cannot be seriously contended that the Renton Court intended to do away sub silentio with the responsibility of the police to protect controversial speech from the prospect of a hostile audience. Nor can the Police Department's suggestion that its action is made pure by the fact that its ultimate motive is to preserve public safety (a factual contention soundly refuted by the district court) sanction the intentional suppression of Dignity's message. 23/ If a listener's reaction to

23/ Petitioners also attempt to distinguish the heckler's veto cases as involving criminal prosecutions of demonstrators for breaching the peace by antagonizing onlookers (Petition at 27), thus implying that enacting a prior restraint without arresting Dignity members does not raise constitutional



the content of speech qualifies as a "secondary effect", then there is nothing left to the the "heckler's veto" doctrine, since such cases invariably involve colorable invocation of the police power and responsibility to preserve public safety.

B. Even if This Were Not a Heckler's Veto Situation, the Police Engaged in Subjective Discrimination Against Dignity.

Moreover, the district court found the existence of another basis for its

concerns. This ill-conceived argument, which condones censorship as long as it avoids punishment, is obviously faulty. The heckler's veto doctrine applies not only to prosecution for inducing unrest from unruly spectators, but also to the affirmative obligation of the police to protect speakers against hostile audiences seeking to suppress them. See generally Collin v. Chicago Park District, 460 F.2d 746 (7th Cir. 1972); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667 (N.D. Ill. 1976); Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).



finding of content discrimination, which refutes the Police Department's claims to a "pure heart", i.e. the somewhat startling evidence of the Police Department's history of complicity with the Archdiocese, leading to the conclusion that the police acted not out of concern for the public safety but out of subjective sympathy with the institutional Church.

(A136, A150-52; see supra pp. 19-23)

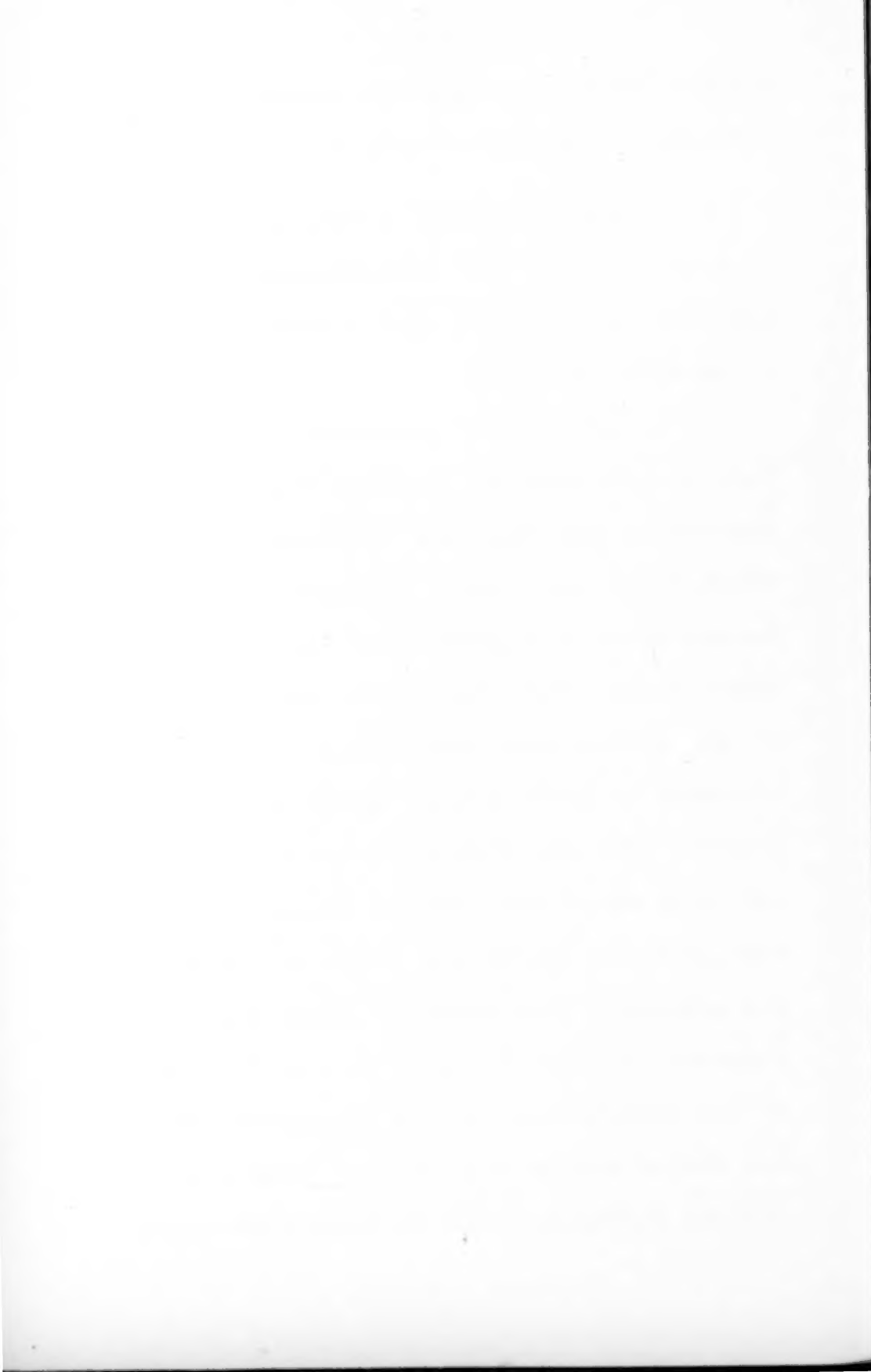
These findings are virtually ignored by Petitioners.

Thus, the finding that the police action in closing the Sidewalk to Dignity is content-based forecloses further analysis under the time, place or manner rationale. Content-based regulations must be justified, if at all, under the stringent "compelling state interest" and "clear and present danger" tests, i.e. extreme circumstances that Petitioners do not even argue are satisfied here. This,

without more, suggests the absence of a need for plenary review by this Court.

II. THE CHALLENGED ACTION BY PETITIONERS, EVEN IF NOT CONTENT-BASED, IS NOT NARROWLY TAILORED TO MEET A SUBSTANTIAL GOVERNMENT INTEREST.

Even if it were necessary to go further and consider whether the proposed regulation was narrowly tailored to meet a substantial government interest, the record below indicates, and the district court found, that the stated apprehensions of the police that they could not prevent violence on Fifth Avenue short of banning Dignity from the Sidewalk were groundless, and thus could not justify intrusive regulation of Dignity's right to convey its message. Particularly given the district court's reliance on its judgment of the credibility of the witnesses, and the strict standard of review from its factual findings, this is hardly an issue



that calls for further review by this Court.

A. The Scope of Judicial Review.

A public sidewalk is of course a quintessential public forum. 24/ Even content-neutral restrictions on the right to demonstrate there are limited to narrowly tailored time, place and manner regulations. Petitioners suggest that judicial review of the constitutionality of such police decisions is reduced to the syllogism that (1) the validity of the police action depends merely on its colorable rationality, and (2) in determining that rationality, the courts must rely exclusively on the police's own assertions. Indeed, the Petition does

24/ E.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. CIO, 307 U.S. 496, 515-16 (1939).



little more than speak frequently and fondly of the truism that the police are charged with protecting public safety, and then invoke the conclusory and unsupported statements that the Police Department thinks Dignity's presence on the Sidewalk would create a potentially violent situation.

Clearly, the role of the courts is more than to engage in the circularity urged by Petitioners:

"Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'" 25/

25/ City of Los Angeles v. Preferred Communications, Inc., 106 S. Ct. 2034, 2038 (1986) (citations omitted; quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984)). Accord, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978)



The constitutionality of even otherwise valid time, place or manner restrictions is dependent upon "the availability of expeditious judicial review of the . . . refusal of a permit". 26/ Thus, in

(court must "make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance").

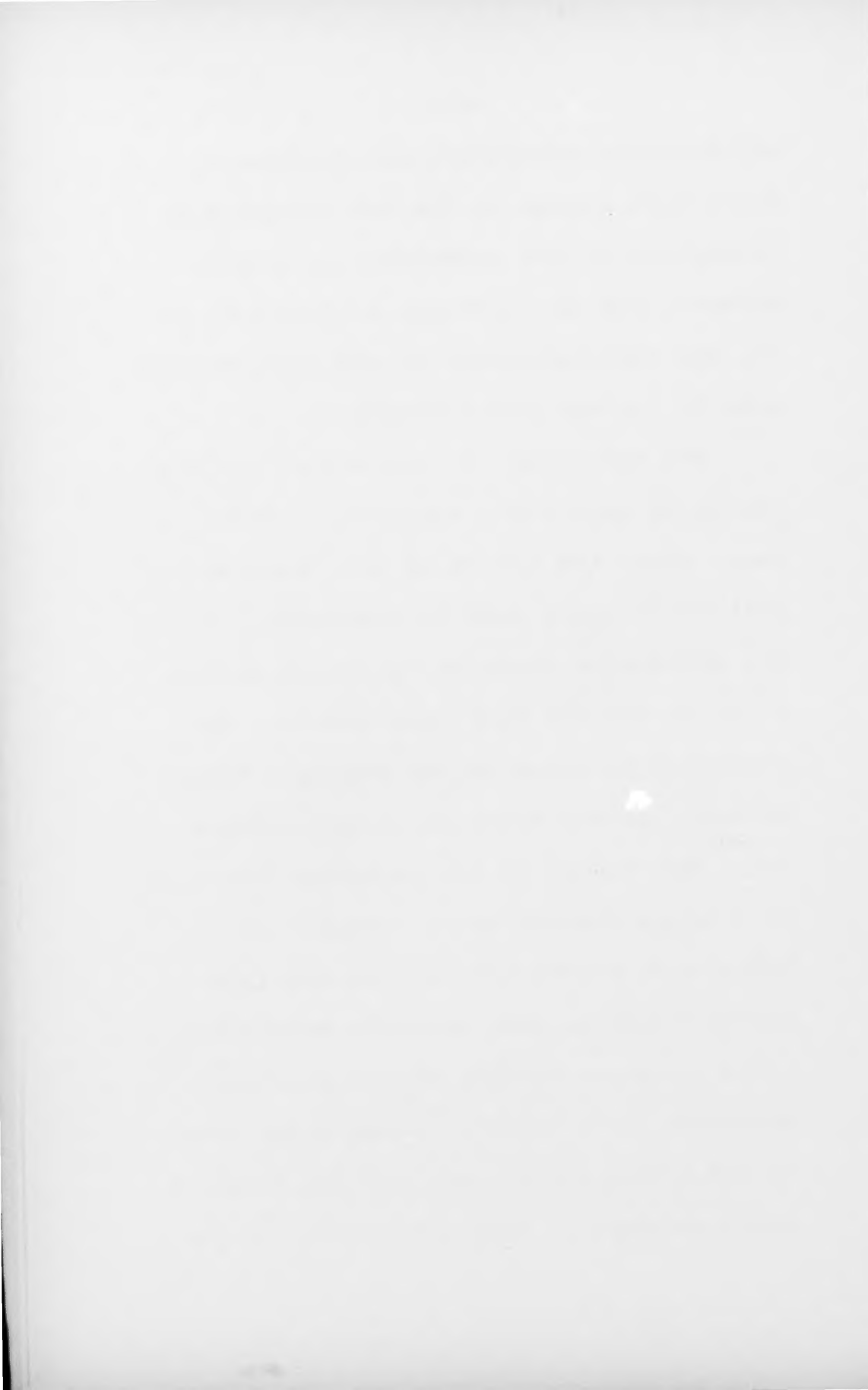
26/ Shuttlesworth v. City of Birmingham, 394 U.S. 147, 155 n.4 (1969); accord, Freedman v. Maryland, 380 U.S. 51 (1965). As the court of appeals aptly noted in addressing the judicial function:

"A court's power to review government restrictions imposed on the exercise of a First Amendment right occupies middle ground between extremes. It does not kowtow without question to agency expertise, nor does it dispense justice according to notions of individual expedience 'like a kadi sitting under a tree'. 'Because the excuses offered for refusing to permit the fullest scope of free speech are often disguised, a court must carefully sort through the reasons offered to see if they are genuine.' The district court performed that sorting process by means of the full trial that it conducted and the thorough opinion it handed down." CA2 Op.: A15-16 (citations omitted).



adjudicating constitutional rights, a court must engage in its own independent inspection of the government interests alleged, and at least the rationality if not the reasonableness of the restrictions used to further those interests.

The necessity of independent judicial review is especially apparent in this case, given the nature of the "regulation" that Petitioners seek to vindicate. While the defendants claim to be acting within § 435 of the New York City Charter, the restraint at issue is not really a "regulation", in the sense of an articulable rule, but rather is the purported exercise of a broad discretionary judgment by individual police officers to restrain speech based on such variable determinations as their reading of the political barometer (Tr. 382-86). (See infra note 35 and accompanying text (citing district court opinion)) Such discretion, if not

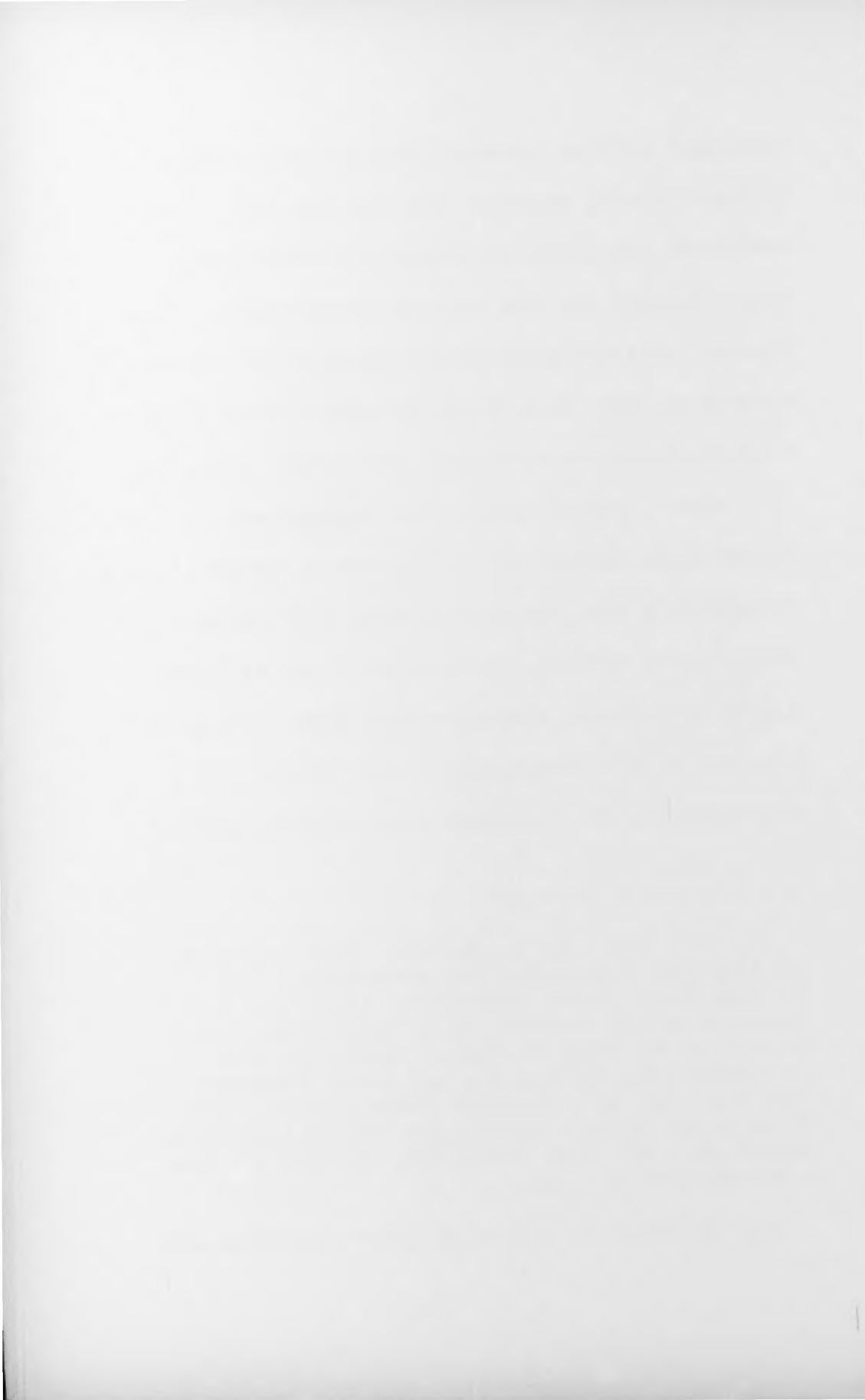


tempered by the possibility of judicial review, would empower the police to restrict any demonstration virtually at will, since, as the Police Department states, essentially every demonstration or parade in New York City is associated with a particular controversy or issue. 27/

Thus, ironically, the unchecked discretion sought by Petitioners would create its own constitutional infirmity. Restraints sought to be justified as time, place or manner restrictions must not give the officials responsible for their enforcement an unguided discretion, 28/

27/ Tr. 380; PX 1, p.235. For example, of the major parades in Manhattan, the Police Department testified that the St. Patrick's Day Parade is affected by the controversy over Northern Ireland, the Columbus Day Parade by friction between the Spanish and Italian communities, the Salute to Israel Parade by the Palestinian question, and the India Day Parade by the Sikh question. Id.

28/ Heffron v. International Society for



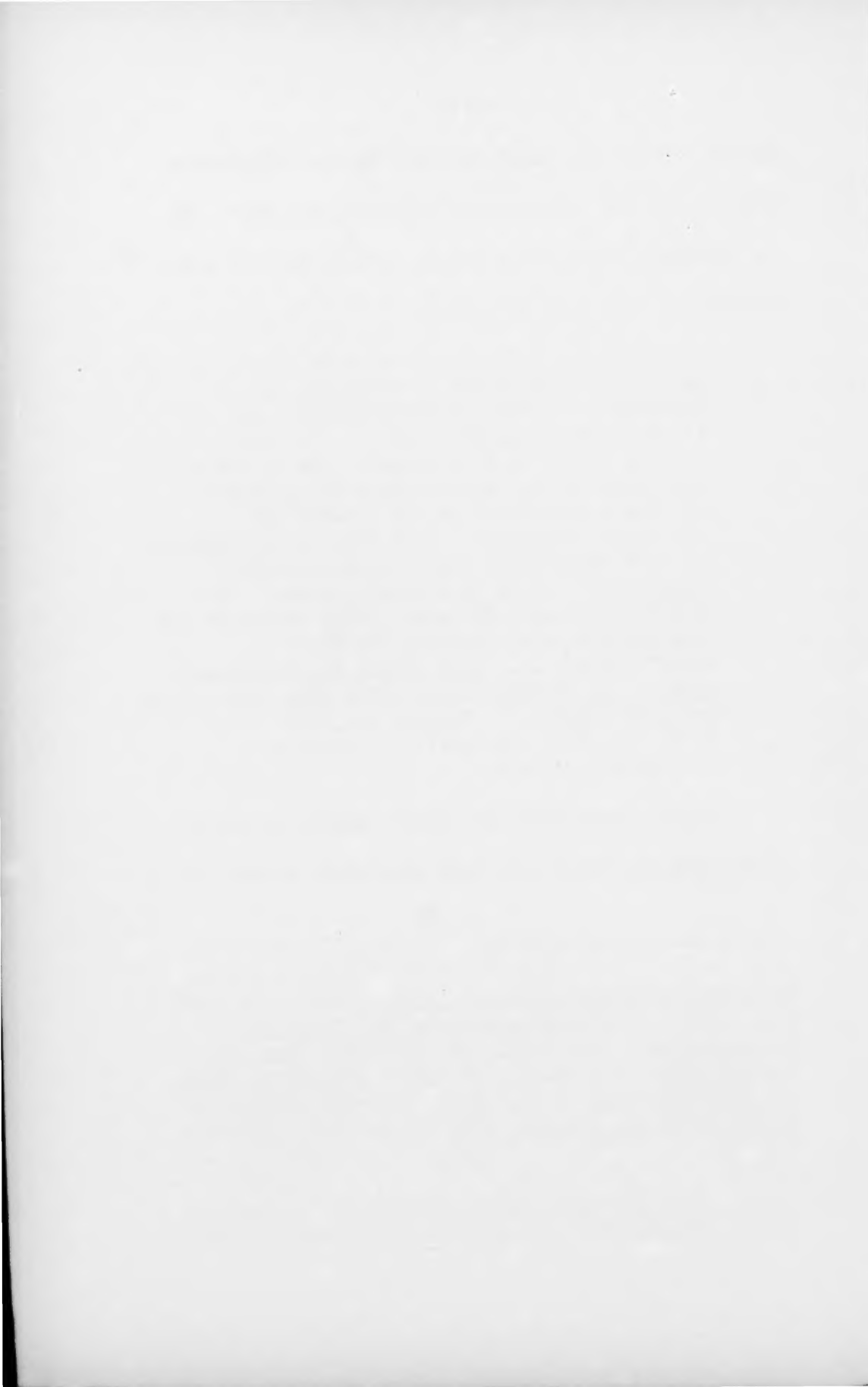
which could be used covertly to suppress the views of unpopular speakers. 29/ It is unconstitutional to grant a government official the ability

"to refuse a permit on his mere opinion that such a refusal will prevent 'riots, disturbances or disorderly assemblage'. It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." Hague v. CIO, 307 U.S. at 516 (plurality opinion; emphasis added).

Here, the Police Department's mere incantation that it has decided there is a

Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); Shuttlesworth v. City of Birmingham, 394 U.S. at 150-53; Cox v. Louisiana, 379 U.S. at 557; Staub v. City of Baxley, 355 U.S. 313, 321-25 (1958); Schneider v. State, 308 U.S. 147, 163-64 (1939).

29/ See Cornelius v. NAACP Leg. Def. & Educ. Fund, 105 S. Ct. 3439, 3455 (1985).



potential for violence does not relieve it of its "duty to maintain order in connection with the exercise of the right" of Dignity to engage in its symbolic expression. Petitioners' ambitious suggestion that the courts should be removed from any meaningful oversight role in checking the use of police power to restrict speech is simply too extreme to warrant plenary consideration. 30/

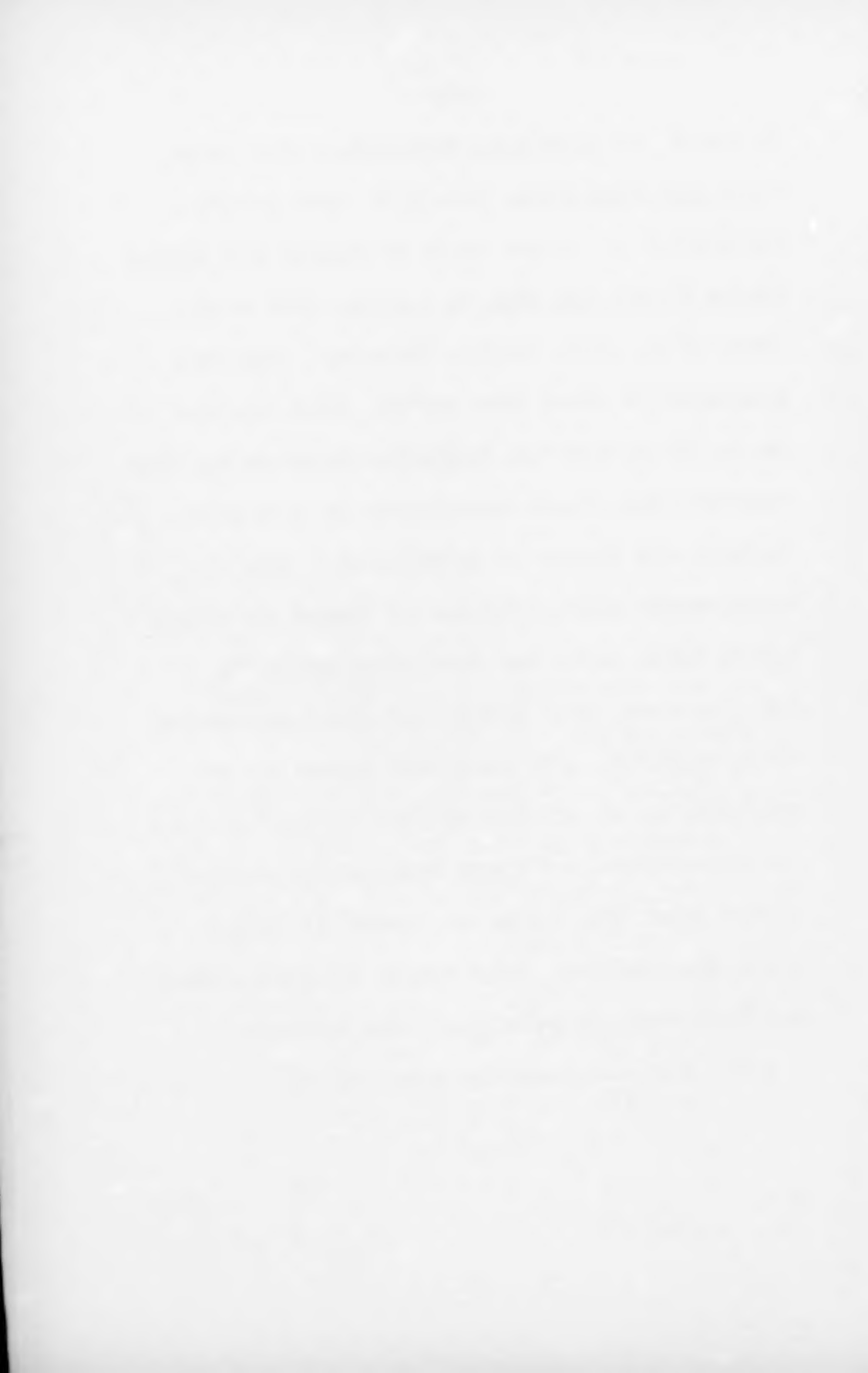
B. The Standards of Clark Were Followed Below.

Petitioners attempt to make out some inconsistency between application of the law by the courts below and this Court's

30/ It is interesting to note that, to a very generous degree, the district court did defer to police "expertise". Despite the indications of police bad faith in this matter, the district court adopted the plan formulated by the police itself in crafting equitable relief. (A158-59)



decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984). Reference to cases such as Clark and White House Vigil for ERA v. Clark, 746 F.2d 1518 (D.C. Cir. 1984), however, for the proposition that the courts must always defer to executive judgment concerning the appropriate steps necessary to preserve safety and order is misplaced. The government restrictions at issue in those cases were codified and long-standing regulations, the result of administrative fact-finding, and were not shown to be applied in an ad hoc manner in particular controversies. It was basically undisputed that the rules at issue in Clark were a normally valid means of protecting against wear and tear in the national parks, and universally applied to



everyone. 31/ Since such codified regulations, if applied as written, are not susceptible to discriminatory application, the only constitutional question that

31/ Moreover, analogy to the regulations upheld in Clark and White House Vigil is inapt, since the restriction Petitioners seek to impose here is of a qualitatively different type. The demonstrators in both those cases were not denied access to demonstrate in the unique location of their choice. Indeed, White House Vigil suggested that totally banning the demonstrators from the White House sidewalk would be unconstitutional. 746 F.2d at 1527. Accord, United States v. Grace, 461 U.S. 171 (1983) (unconstitutional to ban leafleters from Supreme Court sidewalk and to move them across the street).

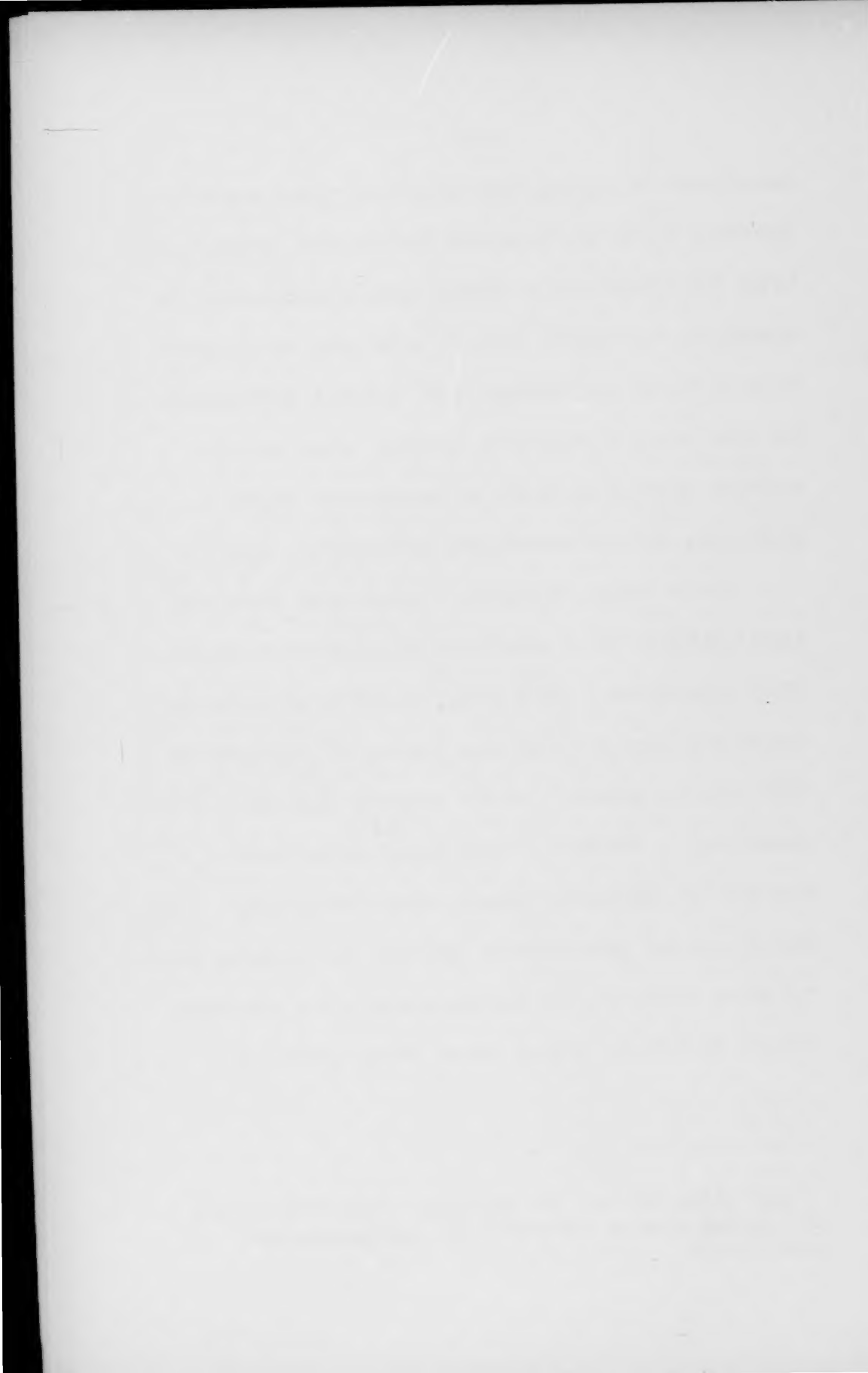
Clark involved restrictions on the manner of the demonstration, i.e. overnight camping in Lafayette Park. White House Vigil involved requirements on the construction of signs, the placement of parcels, and the amount and position of the area that the demonstrators could occupy on the White House sidewalk. Here, the manner of Dignity's demonstration (praying and singing) has never been an issue, and Dignity has always agreed to restrict its demonstration to a specific number enclosed within police barricades. Thus, the closer analogy to the restrictions upheld in Clark and White House Vigil is the plan that Dignity itself sought.



remained in Clark was whether they were drafted with sufficient technical expertise to effectuate their goals narrowly, a question to which the courts may well give substantial (although not total) deference to the administrative agency that deliberated upon and then promulgated them pursuant to rule-making authority. 32/

This case, however, does not involve application of a statute or institutionalized practice. The City Charter provision granting the police the power to "preserve the public peace" is of course not in question. Rather, this case involves review of an individual, discretionary decision by particular police officials as to what they claim is necessary to execute their function under that very general

32/ Similarly, in Renton, the ordinance at issue was a considered legislative enactment.



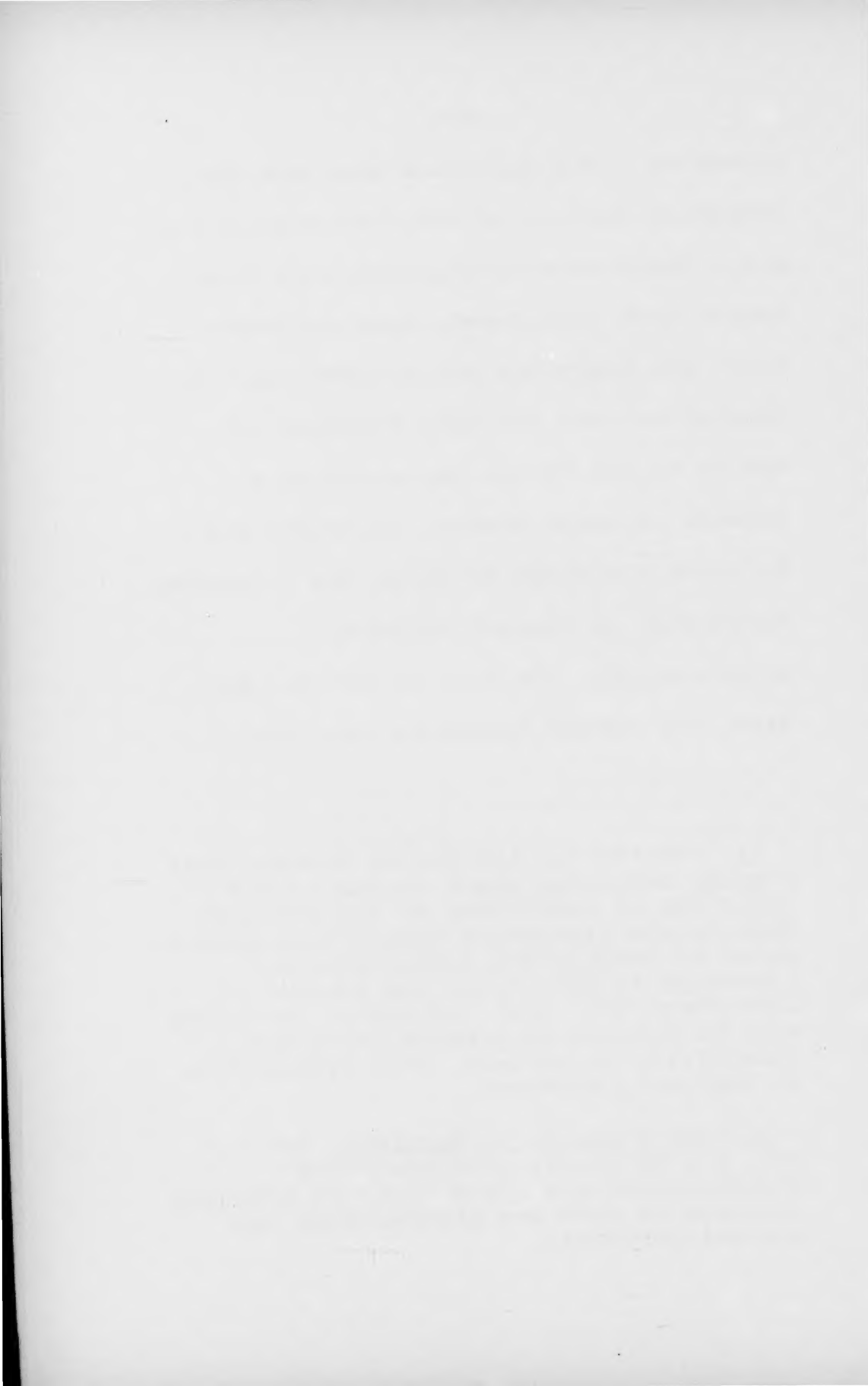
directive. The qualities that are the redeeming feature of codified regulations, e.g., their objectivity—and that they result from considered, open deliberation—are therefore not present. 33/ A regulation that subjects freedoms of speech to the "prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional".

Shuttlesworth, 394 U.S. at 150-51. 34/

Here, the record indicates that the

33/ Remarkably, the police suggest that greater deference might be due to the decisions of individual police officers than to administrative regulations promulgated by legislative authorization. (Petition at 25) Given the greater likelihood that such individual decisions will be colored by personal bias and sensitivity to content, this proposition is logically reversed.

34/ See Niemotko v. Maryland, 340 U.S. 268, 271-72 (1965) (non-statutory undefined official "practice" in granting licenses to park was standardless and unconstitutional).

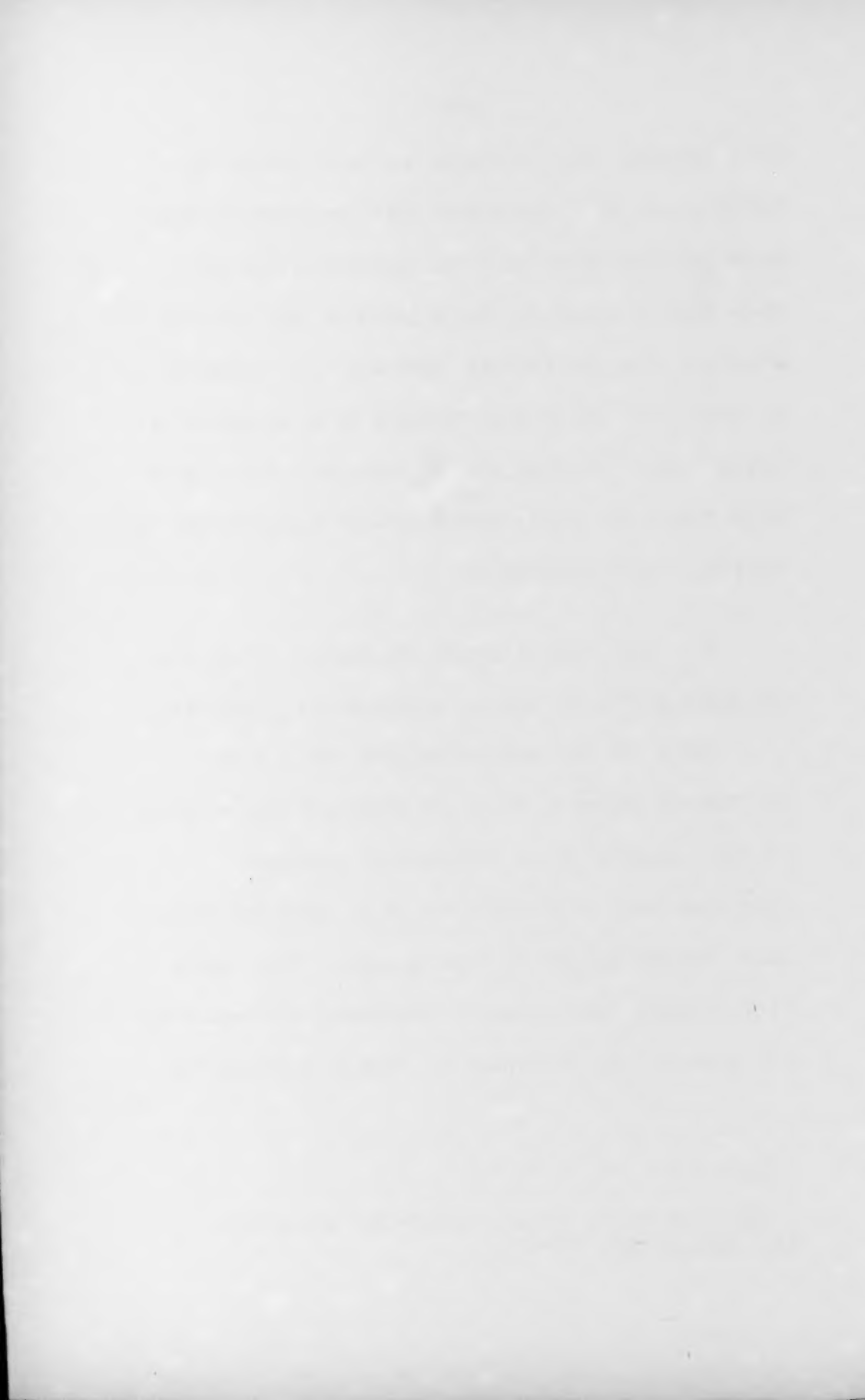


decision-making process as set forth by Petitioner has extended far beyond definable parameters, and is essentially an open-ended inquiry by a police officer on whether the political and social climate in New York City can tolerate a speaker's views. 35/ Petitioners' request to wield this type of unilateral power cannot merit serious consideration.

C. The Regulation At Issue Does Not Further a Significant Government Interest.

Once it is acknowledged that the courts do have a role in protecting rights of expression from potential police suppression, analysis of the rest of this case falls quickly into place. The only significant government interest alleged by the police in defense of their action is

35/ A107-09, A112, A114-15, A118-23.
See supra pp. 40-41.



the protection of public order and the prevention of violence. Respondents of course do not dispute that, in the abstract, these are significant government interests. The question presented in this case, however, is whether those abstract interests are, in actuality, threatened or even seriously implicated by Dignity's presence on the Sidewalk. In findings based heavily on the credibility of the witnesses present at trial, the district court found that they were not.

In its Petition, the Police Department does not even attempt to present a coherent theory on why the danger of violence would be increased significantly by Dignity's presence on the Sidewalk. 36/

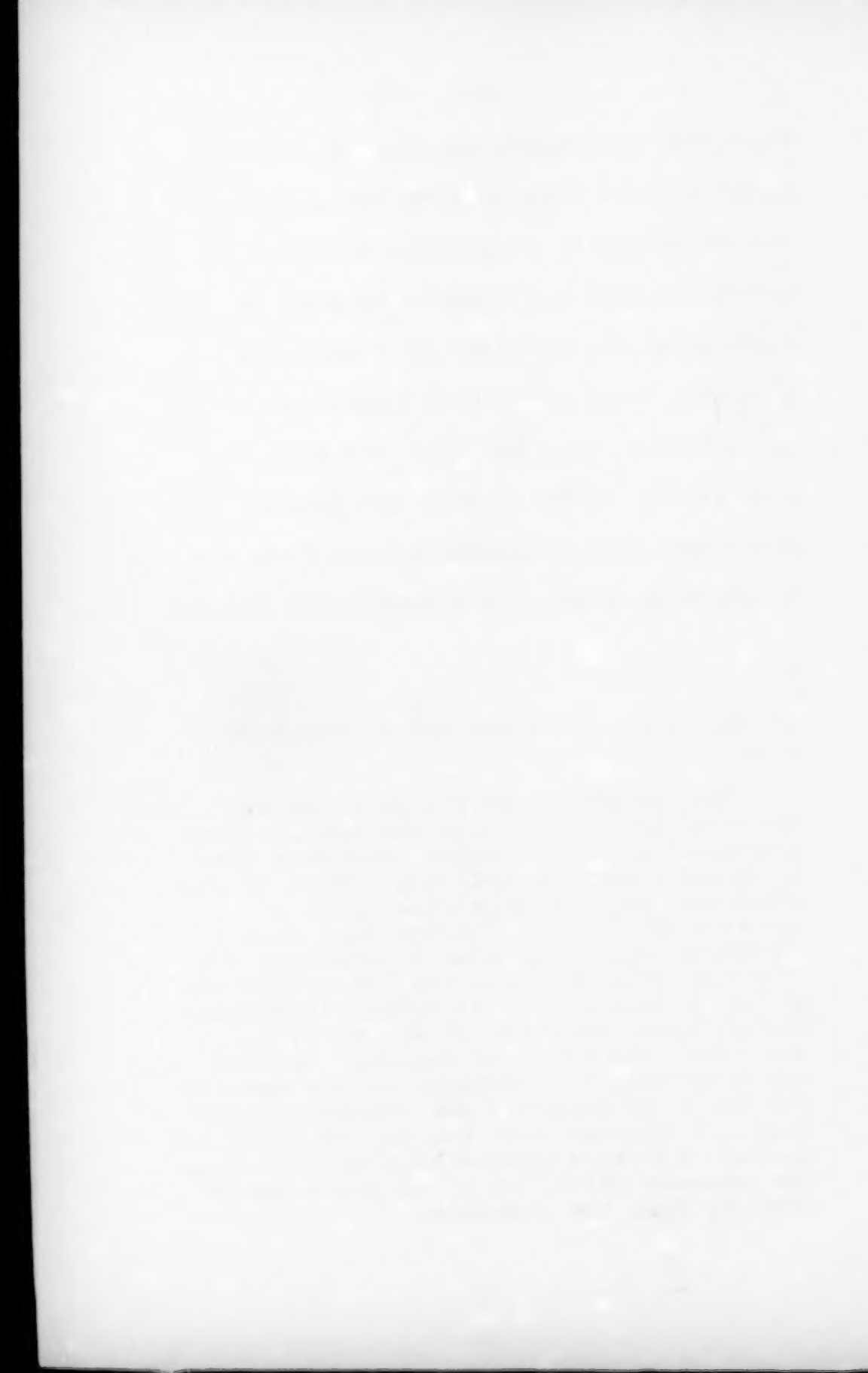
36/ Rather than citing any factual support for its contentions, Petitioners instead rely on comments made by the Second Circuit regarding the potential for violence should Dignity and the anti-gay groups share the Sidewalk simultaneously.



While the Department apparently takes great offense that someone would challenge its "expertise", it now makes little effort to cite any factual support for sustaining its decision to freeze the Sidewalk, even if one were inclined to believe that this decision was made in good faith. Indeed, even the Police Department now belatedly admits that the decision to close the Sidewalk was perhaps

CA2 Op: A18. This was not an issue at trial.

The propriety of the court of appeals reaching out to consider the hypothetical situation of simultaneous demonstrations by Dignity and the anti-gay groups on the Sidewalk, and the appellate court's spontaneous factual finding that such a situation would engender a potential for violence (thereby requiring alternate use of the Sidewalk), is discussed in Respondents' Cross-Petition at No. 86-1177. At any rate, the court of appeals' opinion on the potential for violence in the special situation of simultaneous demonstrations does not suggest that the police could not prevent violence generally, and thus does not support Petitioners' complete ban of Dignity from the Sidewalk.

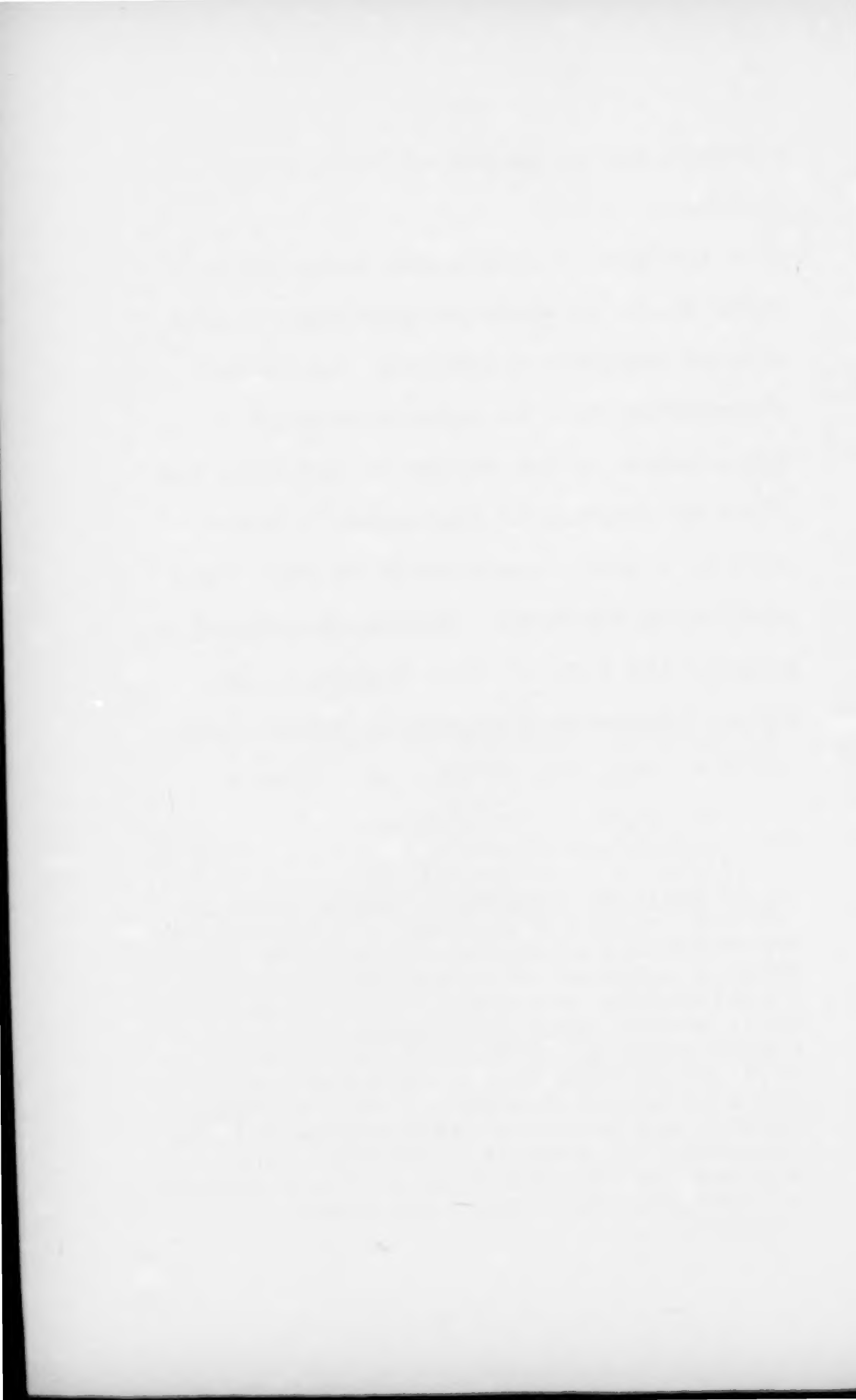


a result of "an excess of caution".

(Petition at 32)

For public safety and order to be a valid basis on which to predicate regulation of expressive activity, an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"; there must be a significant basis in fact for predicting disorder. Police Department v. Mosley, 408 U.S. at 101; Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969). 37/ That a

37/ See also Edwards v. South Carolina, 372 U.S. at 231 (dispersal of civil rights demonstration at statehouse not justified despite presence of recognized possible troublemakers in orderly crowd of onlookers); Blasi, Prior Restraints on Demonstrations, 68 Mich. L. Rev. 1481 1514 (1970) (the threat of a hostile audience almost "certainly will be exaggerated", and may never materialize "if the municipality makes it clear that it will support the demonstrators in their attempt to exercise their first amendment rights").



"hypothetical coterie of the violent and lawless" might be sufficiently annoyed to retaliate is clearly not a basis for censorship of expression. Cohen v. California, 403 U.S. 15, 23 (1971).

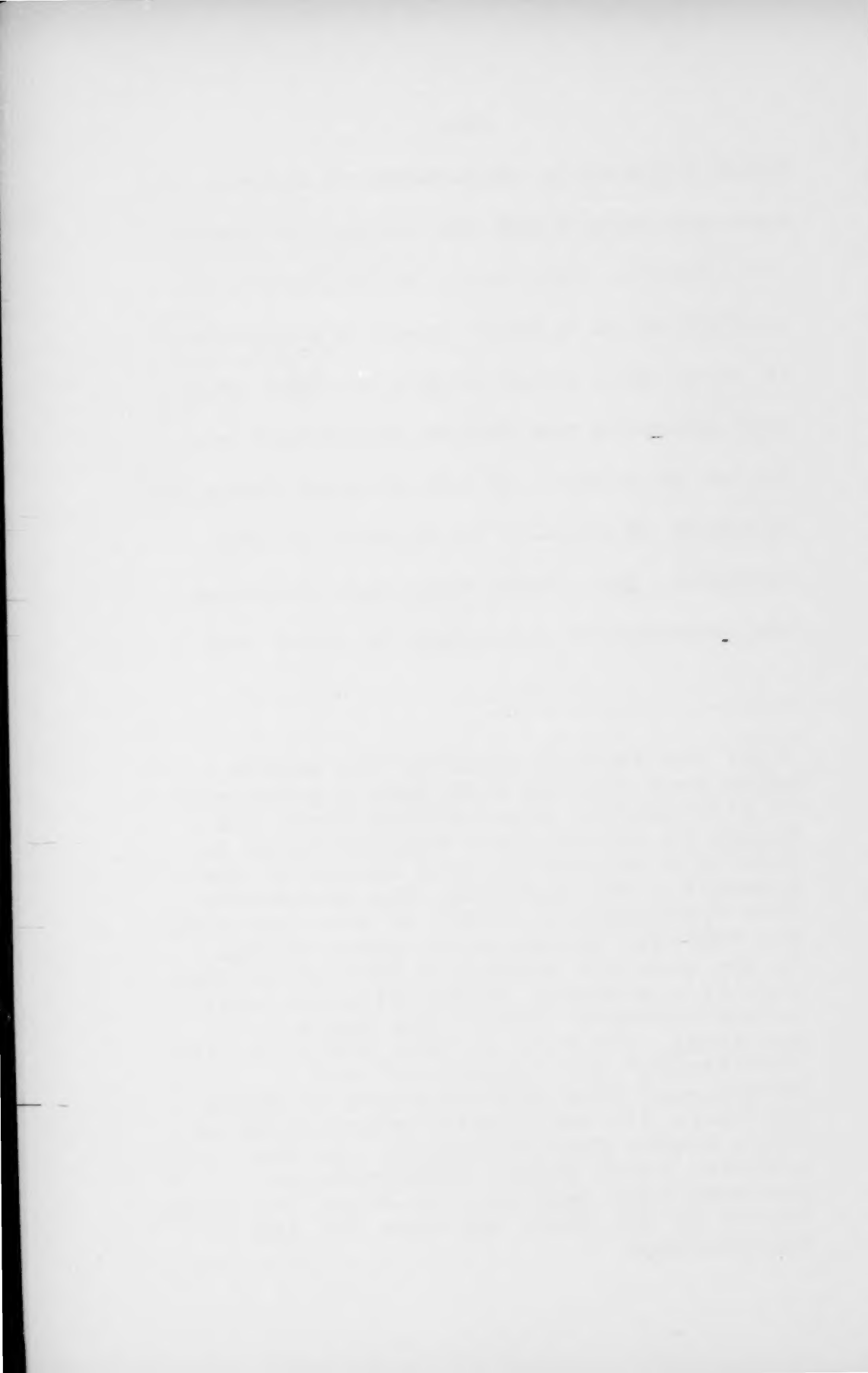
Petitioners were therefore required at least to present objective and credible evidence that Dignity's presence on the Sidewalk presented a serious likelihood of triggering a breach of the peace.

The Police Department's case is therefore reduced to the question of whether it adduced such overwhelming objective evidence that the district court must be found clearly erroneous in finding that the protestations of possible violence were neither credible nor rational. The Police Department admits that the anti-gay groups are on the whole non-violent and intend to demonstrate peacefully. Moreover, the police have specifically stated that they are not concerned

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about a possible confrontation between the anti-gay groups and the Parade marchers (Tr. 353-54, 361, 367), which rebuts any prediction of a large scale disturbance. It is at this point simply unclear upon what evidence the Police Department now relies in support of its alleged fears for violence if Dignity is allowed on the Sidewalk. 38/ Thus, this case presents the commonplace situation in which one

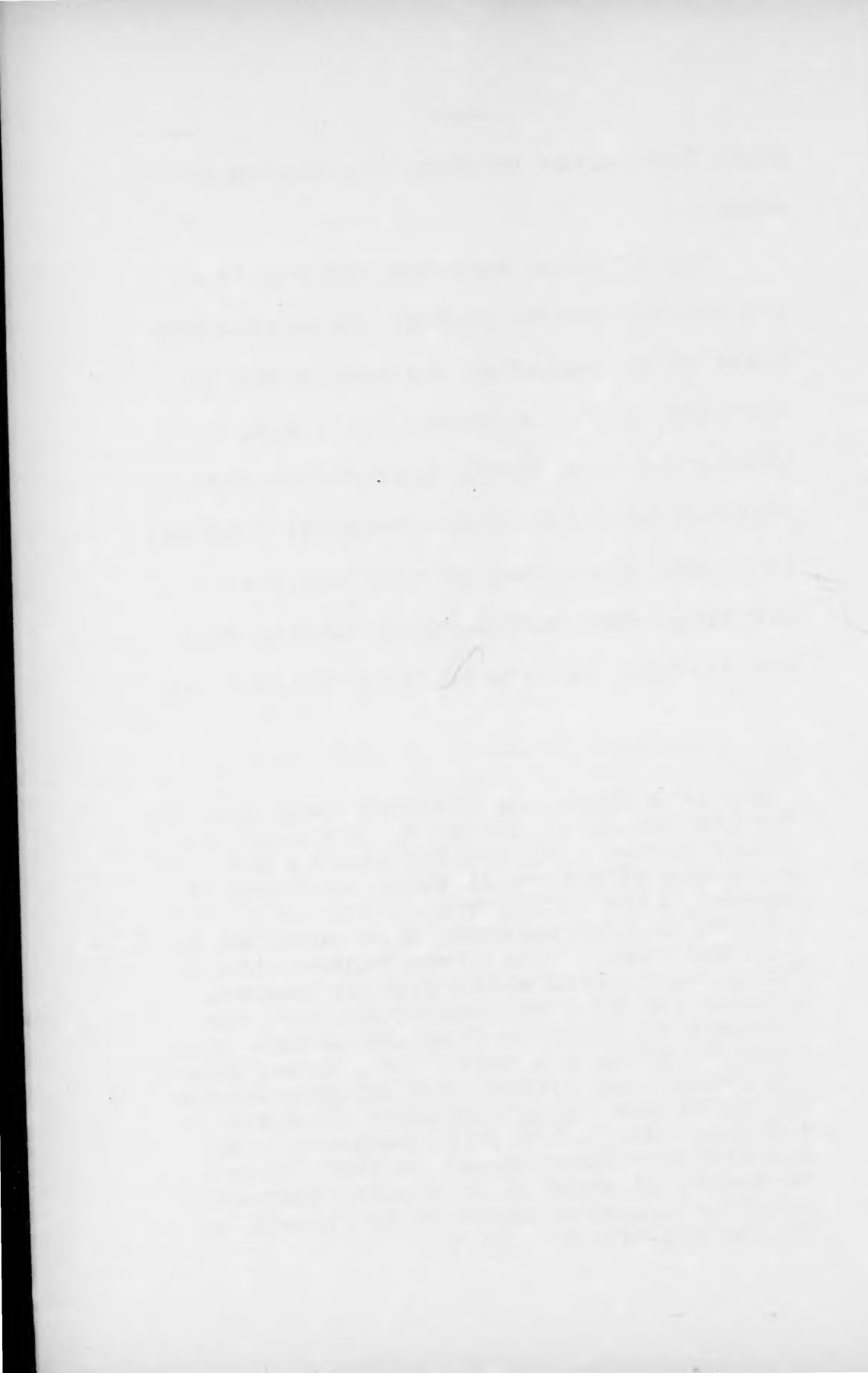
38/ The factors cited to the courts below were for the most part a potpourri of disconnected observations about the Parade in general that are unrelated to Dignity's request to have access to the Sidewalk. For instance, the contention that "provocative words" or gestures from the anti-gay groups might occur at the Parade does not support a conclusion that Dignity's presence on the Sidewalk will induce violence (A98). See Cox v. Louisiana, 379 U.S. at 543, 548 n.12, 550 ("muttering" and "grumbling" and "rumblings" from hostile crowd of white onlookers did not justify suppression of civil rights demonstration). As the district court noted, such words or gestures have been part of every Gay Pride Parade in the past, and have not led to any violence.



party has failed to carry its burden of proof.

The Petition does not address in a substantive manner whether its challenged restriction satisfies the next prong of the time, place or manner test, i.e. whether it is narrowly tailored to meet whatever significant governmental interest is shown, other than to conclude that anything other than banning Dignity from the Sidewalk amounts to "fine tuning". 39/

39/ In a sense, Petitioners leap frog to the last prong of the time, place or manner tests, i.e. whether there were ample and effective alternative modes of communication. They then refer to a "wreath laying" ceremony that occurred in 1984 and 1985. Under this scheme, the Parade was halted while Dignity members watched two of their number go onto the Sidewalk for no more than one minute in order to place a wreath. Of course, since the Parade was halted, the other marchers in the Parade, i.e. Dignity's intended audience, did not see the ceremony. As the district court noted in 1985, this ceremony, at which only Dignity members would be present, amounted to "preaching to the converted". (A240)



As the district court noted, whether the regulation is narrowly tailored logically depends on the relative significance of the threat to the asserted government concern. (A156-57) Here, it found the threat to be speculative and minimal, and concluded that the corresponding regulation, which totally barred Dignity from the Sidewalk and thus also totally barred its symbolic message, was "too severe" to qualify as "narrowly" tailored, especially when taken in the face of a plethora of more logical choices, beginning with tighter control on the anti-gay groups, who are, after all, the alleged source of the potential for violence.



CONCLUSION

Petitioners essentially base their argument on the premise that "the federal judiciary should not interfere with reasonable time, place and manner restrictions grounded in good-faith police judgments" (Petition at 20; emphasis added) Respondents agree. 40/ However, the record here demonstrates, and the trial court found, that the restrictions imposed were neither "reasonable" nor in "good faith".

While the facts of this case are curious, and perhaps even disturbing, the application of law presents nothing that this Court has not repeatedly announced as

40/ By "good faith", Respondents assume Petitioners refer to objective good faith and reasonableness. The subjective good faith, or "pure heart", of individual police officers, however, cannot make constitutional an otherwise unconstitutional restriction.



well-travelled ground. The petition for writ of certiorari should be denied.

January 30, 1987

Respectfully submitted,

STUART WALTER GOLD
Counsel of Record

RONALD K. CHEN
JENNIFER J. RAAB
Cravath, Swaine & Moore
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

Attorneys for
Respondents

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
(212) 422-3000

Of Counsel.

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No. 86-989

Supreme Court, U.S.
FILED

FEB 6 1987

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as
Police Commissioner of the City of New York,
EDWARD I. KOCH, in his official capacity as
the Mayor of the City of New York, and the
NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

-against-

MICHAEL J. OLIVIERI, et al.,

Respondents.

REPLY BRIEF ON PETITION
FOR WRIT OF CERTIORARI

DORON GOPSTEIN,
Acting Corporation Counsel,
of the City of New York,
Attorney for Petitioners,
100 Church Street,
New York, New York 10007.
(212) 566-4581 or 4338

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

*Counsel of Record

February 6, 1987

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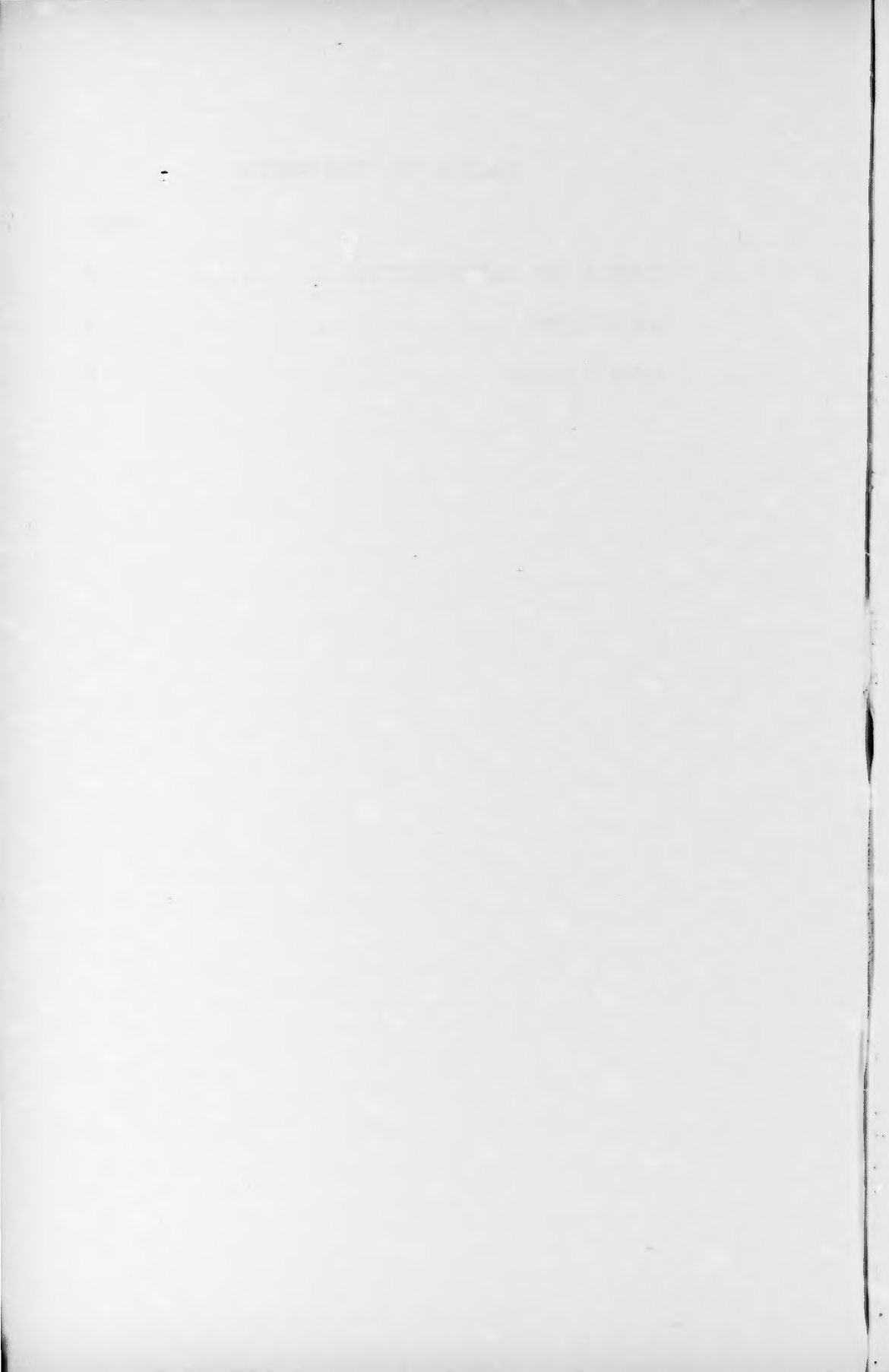
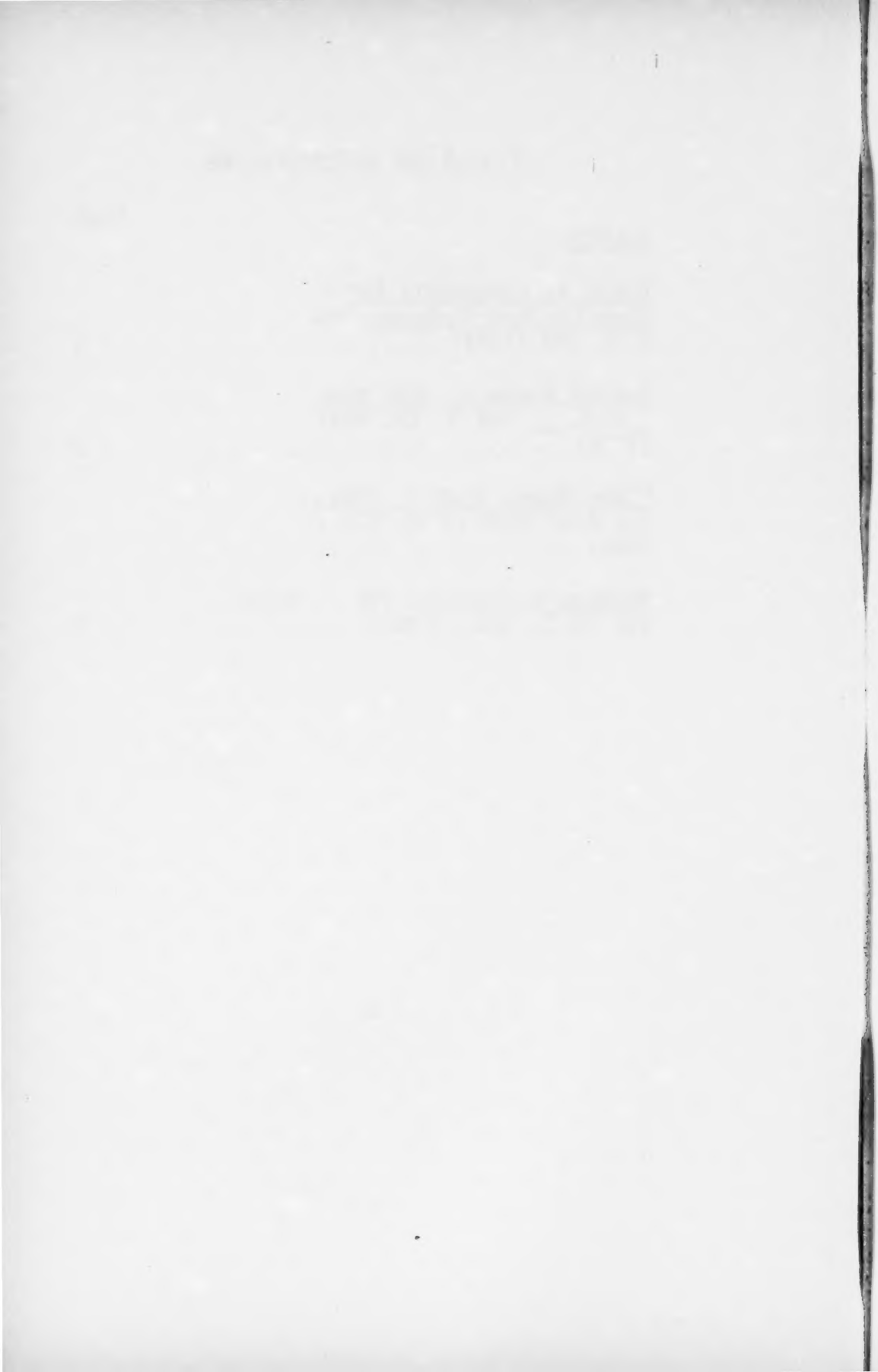


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Pursuant to Rule 22.5 of the Rules of
this Court, petitioners submit this brief in
reply to the brief submitted by respondents
in opposition to the petition for certiorari.

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ARGUMENT

(1)

Judged by its tone, one might infer from respondents' brief that petitioners had relegated them to some location distant from St. Patrick's Cathedral or the line of the Gay Pride March and thereby prevented them from reaching their intended audience. See Question 1(a) of Respondents' Counter-statement of Questions Presented For Review ("... the only justification offered by the police in prohibiting Respondents' symbolic speech ..."); see also, Br. Op., p. 30 ("reason ... for the 'freeze' was to suppress the symbolic speech") (emphasis added). The overstatement of respondents' brief is illustrated by the very precedent which they cite. See, e.g., Williams v. Wallace, 240 F. Supp. 100, 104 (M.D. Ala. 1965), where District Judge Frank Johnson issued an injunction against Alabama officials

CHAPTER I

The first part of the book is devoted to a general survey of the history of the world, from the beginning of time to the present day. The author discusses the various stages of human civilization, from the earliest times to the modern era. He traces the development of the human race, from the first appearance of man on the earth to the present day. He also discusses the various religions and philosophies that have shaped human thought and action. The author's aim is to provide a comprehensive overview of the world's history, from the beginning to the present day.

where the police had harassed blacks demonstrating in connection with voter registration drives; such harassment included beatings and the use of cattle prods on the marchers.

As we indicated in the petition, this case concerns only the side of Fifth Avenue from which respondents may demonstrate, and despite respondents' desire for the most interesting backdrop for their demonstration, there has been no violation of their rights of free speech. While respondents' brief contains numerous citations to decisions dealing with free speech issues, they have failed to present to the Court of Appeals, or to this Court, precedent showing that the de minimus restriction on their First Amendment rights constitutes a "heckler's veto." In light of the Court of Appeals' holding that both respondents and the counter-demonstrators had free speech rights

which must be considered, petitioners' even-handed accommodation of both groups is the antithesis of a "heckler's veto."

Respondents alternatively argue that the petitioners' actions were shown to be content-discriminatory because of the "conclusion that the police acted not out of concern for the public safety but out of subjective sympathy with the institutional Church." Br. Op., p. 35. The "conclusion" to which respondents refer is the District Court's comment that, in light of its belief that the petitioners' concern for public safety was irrational, a "more convincing explanation for the police decision is ... police sensitivity to the discomfort of counter-demonstrators and the Catholic Church, as well, perhaps, as discomfort

within the Police Department" (A136).¹

However, as we read its opinion, the District Court conceded that evidence of police "complicity" with the Church was not sufficient to show that the actions of the police were not content-neutral and relied on its own second - guessing of police fears of violence in speculating that the restriction was the result of content discrimination (A136, A150-52). As we show in our petition, this kind of vague speculation by the District Court, supported by its own judgment as to the wisdom of police actions, is insufficient to constitute a finding that

¹References preceded by "A" are to the Appendix to the Petition. References preceded by "CA" are to the Joint Appendix in the Court of Appeals.

the substantial motivating factor of the police action was concern for public safety.²

(2)

We do not urge, as respondents suggest we do, that the federal judiciary plays no role in reviewing police time, place and manner restrictions. However, we believe that the lower courts should not be making the kind of judgments engaged in by the District Court (e.g., speculating as to the police department's ability to maintain order

²We do not mean to concede that the District Court's comments about police "complicity" with the Archdiocese are supported by the record; we believe that its reference to certain isolated pieces of evidence, restated in respondents' brief, constitutes a misreading of the record which transforms the petitioners' attempts to communicate with all parties interested in the parade, including respondents (CA 171-72), into complicity with the Archdiocese or anti-gay forces (A151-52). However, as we outline above, the District Court's comments about such evidence is irrelevant to the legality of petitioners' actions.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL.

TO THE HONORABLE SENATE OF THE UNIVERSITY OF CHICAGO
I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed amendment to the constitution of the University of Chicago, and in reply to inform you that the same has been referred to the Committee on the subject, and that they are now considering the same.

I am, Sir, very respectfully,
Your obedient servant,
J. D. COLEMAN, Secretary.

should violence arise [A125]),³ or as did the Court of Appeals, second-guessing the police in their judgment as to the most prudent manner of resolving competing, First Amendment interests. Significantly, in light of the Court of Appeals holding that the petitioners must accommodate the First Amendment rights of the counter-demonstrators, and its modification of the District Court order so as to allow each group on the sidewalk at different times, any assertion that the petitioners' "freeze" of the Cathedral sidewalk does not further a significant government interest is baseless.

³ Respondents claim that the District Court merely effectuated a plan formulated by petitioners in drafting its injunctive order (A158-59). Such plan, however, was formulated only on the contingency that the District Court's order on the application for a preliminary injunction survived appeal, and was not a plan that petitioners felt was appropriate (CA260, CA266-67; A129-32).

The first of these is the fact that the
state of the mind of the individual
is not a static condition but a dynamic
one. It is a process of change and
growth. The second is the fact that
the state of the mind is not a
private affair but a social one. It
is a condition which is shaped by
the environment and which in turn
shapes the environment. The third is
the fact that the state of the mind
is not a mere reflection of the
world but a creative force which
can transform the world. The fourth
is the fact that the state of the
mind is not a mere product of the
past but a product of the future.
The fifth is the fact that the state
of the mind is not a mere condition
of the individual but a condition
of the community. The sixth is the
fact that the state of the mind is
not a mere condition of the present
but a condition of the future. The
seventh is the fact that the state
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of the community. The eighth is the
fact that the state of the mind is
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but a condition of the future. The
ninth is the fact that the state of
the mind is not a mere condition
of the individual but a condition
of the community. The tenth is the
fact that the state of the mind is
not a mere condition of the present
but a condition of the future.

However, even absent the Court of Appeals' modification, there is no basis on this record for determining that the minimal intrusion of the "freeze" does not further a substantial government interest. See United States v. Albertine, __U.S.__, 105 S. Ct. 2897, 2907 (1985).

Finally, respondents seek to distinguish Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and White House Vigil v. Clark, 746 F.2d 1518 (D. C. Cir., 1984), essentially on the grounds that those cases involve administrative regulations. We are aware of no precedent mandating that content-neutral police determinations be given less deference than administrative regulations under a time, place and manner analysis. If there should be policies effectuated by such lesser deference, the Court should grant the petition and set forth those policies.

Contrary to petitioners' assertion that this case presents "unique" facts, this case raises important constitutional issues concerning municipalities' power to insure public safety on their streets and sidewalks so that the viewpoint of all, including respondents, may be safely expressed.

CONCLUSION

THE PETITION FOR CERTI-
ORARI SHOULD BE
GRANTED.

February 6, 1987

Respectfully submitted,

DORON GOPSTEIN,
Acting Corporation Counsel,
of the City of New York,
Attorney for Petitioners.

LEONARD KOERNER,*
STEPHEN J. McGRATH,
of Counsel.

*Counsel of Record.